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FRAUD AND SURPRISE IN LEGAL PROCEEDINGS

THE golden age of fraud seems to have passed. Modern inventions have been unkind to the fraud-doer. One of the essentials of successful deception is to prevent those who know bits of the truth getting together and adding it up. Fast and reliable postal services, the telegraph, telephones, and widespread literacy have all helped to relegate fraud to a minor place in the catalogue of professions. Of course, there are the occasional scandals, such as pottery being made available in England,[1] or copper abroad,[2] and one does not know how much fraud goes undetected by the victim, but at any rate the law reports do not abound in cases of gigantic and audacious frauds as once they did.

Fraud in legal proceedings is perhaps the least popular of all the frauds still practised at all. At one time it was rife, and people seem to have made quite a living out of it, particularly in Ireland.[3] No doubt the impression is exaggerated, but one might be forgiven for thinking that in the Irish Court of Exchequer, in the days when it had practically a monopoly of the equity business of that country, justice first go was a rarity. Perhaps the judges are more astute today, or less hurried. Quick public transport, telephones, and the other paraphernalia of modern life have made it difficult to keep people out of the way, and the avidity with which newspapers report litigation rather militates against keeping it dark. But who would dare say it will never happen again? If it should have to be determined in the future whether there has been fraud in legal proceedings, the question is not likely to be one of difficulty. That question having been answered, though, it is not so clear what is to be done about it: there has been judicial controversy on *how* fraud affects judgments.

1 *R.* v. *Newland* [1954] 1 Q.B. 158.
2 *R.* v. *Devereaux* (1954) *The Times*, April 12, p. 2.
3 See, *e.g.*, Lord Redesdale's lament in *Giffard* v. *Hort* (1804) 1 Sch. & L. 386, 395–397.

THE WAY FRAUD AFFECTS LEGAL PROCEEDINGS

There can be no doubt that once a decision has been shown to have been obtained by fraud, it ceases to be a fully valid judicial decision,[4] even when it has emanated from the highest court for the United Kingdom.[5] This has been recognised from very early times. In *Fermor's* case,[6] all the judges and barons, with two dissentients, held a fine void, saying[7]: "... the common law doth so abhor fraud and covin, that all acts as well judicial as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful: *quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur.*" And Lord Mansfield, giving the judgment of the court in *Taylor* v. *Horde*,[8] said: "All acts by fraud and covin are void. A common recovery, which the parties had no power to suffer by right, shall not be supported by wrong and fraud. ..."

Various consequences of fraud on or in court have been suggested. Sometimes it has been said that a judgment obtained by fraud is a nullity, sometimes that it can be set aside. In *Prudham* v. *Phillips*,[9] it was suggested that a party could not have a judgment set aside for fraud or collusion, though it could be done at the instance of a stranger injured by the decision. Grey C.J., giving the unanimous advice of the judges to the House of Lords in the *Duchess of Kingston's Case*,[10] said that it was not settled whether a party to a judgment could afterwards dispute it as being fraudulent; but it must be regarded as settled by *Tommey* v. *White*[11] that he can.

Tommey v. *White* is an astonishing saga of torture by litigation. Tommey assigned a lease of his Dublin hotel on trust for his creditors, the trustees having a power of sale which in 1834 they proposed to exercise. Tommey objected. The trustees accordingly obtained an order for a receiver and an injunction from the Master of the Rolls, and later, an order putting the receiver in possession. In 1835 the Lord Chancellor decreed a sale, which took place, and in 1836 another Lord Chancellor made a decretal order. Then

[4] *Fermor's Case* (1602) 3 Co. 77a; *Bradish* v. *Gee* (1754) Amb. 229; *Taylor* v. *Horde* (1755) 1 Keny. 143; *Duchess of Kingston's Case* (1776) 1 Leach 146; *Bandon* v. *Becher* (1835) 3 Cl. & F. 479; *Macpherson* v. *Tytler* (1839) 1 Sec. Ser. 718; *Philipson* v. *Earl of Egremont* (1844) 6 Q.B. 587; *Imray* v. *Magnay* (1843) 11 M. & W. 267; *Bradley* v. *Urquhart* (1843) 11 M. & W. 456; *Meddowcroft* v. *Huguenin* (1844) 4 Moo.P.C. 386; *Flower* v. *Lloyd* (1877) 25 W.R. 793; *Wyatt* v. *Palmer* [1899] 2 Q.B. 106; *Hip Foong Hong* v. *H. Neotia & Co.* [1918] A.C. 888; *Everett* v. *Ribbands* (1946) 175 L.T. 143.

[5] *Stewart* v. *Agnew* (1823) 1 Shaw App.Cas. 413; *Tommey* v. *White* (1853) 4 H.L.C. 313; *Shedden* v. *Patrick* (1854) 1 Macq. 535.

[6] (1602) 3 Co. 77a.

[7] 3 Co. 78a.

[8] (1755) 1 Keny. 143, 233.

[9] (c. 1747) Amb. 763. And see *Style* v. *Martin* (1669) 1 Ch.Cas. 150.

[10] (1776) 2 Sm.L.C., 10th ed., 713, 721.

[11] (1853) 4 H.L.C. 313.

Tommey took the offensive, and bombarded the trustees with litigation, uniformly unsuccessful until the eighth attempt. (1) 1837: bill of revivor and supplement. (2) 1837: petition for restoration of the property. (3) 1839: petition to the Appeal Committee of the House of Lords for leave to appeal from the decree of 1835. (4) 1839: petition to the Lords to rescind the decision of the Appeal Committee and for leave to appeal against the 1837 decision. Leave to appeal was now granted (!) but the appeal was dismissed. (5) 1844: bill for review and reversal of the 1835 decree. (6) 1845: appeal to the Lord Chancellor from the 1844 decision of the Master of the Rolls. (7) 1846: appeal to the House of Lords against the Lord Chancellor's order of 1845 and against the decree of 1835. (8) 1848: petition to the Appeal Committee for permission to appeal to the House of Lords against the orders of 1834 and the decrees of 1835 and 1836. He now alleged that the House of Lords had never before considered the decree of 1835 (a fraudulent misstatement). Leave to appeal was granted, and the appeal was allowed *in toto* (!). The trustees had long since given up appearing as Tommey had no money with which to pay their costs. They now woke up, and petitioned for a rehearing of the appeal, but the House refused to entertain the petition. They afterwards petitioned again to be heard, and Tommey counter-petitioned that they be refused. Leave, however, was granted. Elmsley, for Tommey, was bold enough to argue: "The principle on which the rehearing must be refused is, that there must at some time be a final end to litigation" (!). In the end, the House (consisting of Lord Cranworth L.C., for Lord Brougham attended only the argument and Lord Truro became ill after hearing only part of the argument) declared their order of 1848 a nullity on the basis that the appeal had been brought about by fraud. Tommey's last—unsuccessful—fling was to ask for the costs. It would be interesting to know how he plagued the trustees after that; but he then faded from the reports, and the bar lost a regular customer.

The view that a decision obtained by fraud is void [12] seems to have been displaced by the opinion that such a judgment will stand unless the person aggrieved by it does something to have it set aside.[13] In *Tommey* v. *White* [14] the House of Lords held that it could set aside its own previous decision, but in *Shedden* v. *Patrick* [15] Lord St. Leonards was alone in thinking this the correct procedure.

[12] See *Taylor* v. *Horde* (1755) 1 Keny. 143; *Carew* v. *Johnston* (1805) 2 Sch. & L. 280; *Stewart* v. *Agnew* (1823) 1 Shaw App.Cas. 413, 434, *per* Lord Eldon; *Macpherson* v. *Tytler* (1839) 1 Sec.Ser. 718; *Reece* v. *Trye* (1847) 1 De G. & S. 273; *Shedden* v. *Patrick* (1854) 1 Macq. 535.

[13] *Bradley* v. *Eyre* (1843) 11 M. & W. 432, 450, *per* Parke B. And see *Mussel* v. *Morgan* (1790) 3 Bro.C.C. 74.

[14] (1853) 4 H.L.C. 313.

[15] (1854) 1 Macq. 535, 626–8.

Jessel M.R., in *Flower* v. *Lloyd*,[16] thought that, though a judgment could be set aside by original action, the leave of the court whose judgment was impugned should first be obtained. This requirement does not appear elsewhere. In *Bowen* v. *Evans*[17] Lord Cottenham said: "It is true, that if a case of fraud be established, Equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of a Court of Equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud."

In *Flower* v. *Lloyd*,[18] the pendulum had swung fully, the Court of Appeal holding that it could not, on motion being brought directly before it without prior proceedings in a lower court, set aside its own judgment on the ground of fraud, but that an action could be brought to have it set aside. The view that there must be a new action was adopted by the House of Lords in *Jonesco* v. *Beard*,[19] where it was held that the Court of Appeal cannot normally set aside a High Court decision and order a new trial on the ground that the High Court decision was obtained by fraud. The qualification "normally" was added in deference to the fact that it had been done once or twice in the past. It can now be taken that, as evidence is not normally adduced in the Court of Appeal, the proper way to attack a judgment on the ground of fraud is by original action.[20] An unsuccessful defendant could resist execution on the ground that judgment was obtained by fraud, as was held in *Philipson* v. *Earl of Egremont*,[21] but no such easy course is available to a defrauded plaintiff. Under the heading of "Judgments obtained by Fraud," Seton[22] simply states: "Where a decision of the Court of Appeal is impeached as having been obtained by fraud, the proper course is not to apply for a rehearing, but to commence an original action in the High Court to set aside the judgment. . . ."

In *Smith* v. *Tonstall*[23] it was held that an innocent third person who suffered could bring an action for damages against fraudulent

[16] (1877) 25 W.R. 793, 794.
[17] (1848) 2 H.L.C. 257, 281. And see *Shedden* v. *Patrick* (1854) 1 Macq. 535, the majority view, obiter.
[18] (1877) 6 Ch.D. 297. And see *Nixon* v. *Loundes* [1909] 2 I.R. 1.
[19] [1930] A.C. 298. This decision was applied in *Stern* v. *Friedman* [1953] 1 W.L.R. 969.
[20] As to possible procedures for correcting judgments obtained by fraud, see Kerr, *Treatise on the Law of Fraud and Mistake*, 7th ed., pp. 416–7, and authorities there cited.
[21] (1844) 6 Q.B. 587. And see *Imray* v. *Magnay* (1843) 11 M. & W. 267; *Shattock* v. *Carden* (1851) 6 Ex. 725.
[22] *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 6th ed., p. 859. And see Cheshire, *Private International Law*, 4th ed., p. 625.
[23] (1686) Carth. 3.

parties who collusively obtained a judgment in an action having no foundation in law.

FRAUD AND SURPRISE

There may be doubt in some cases whether a decision is foolproof or not, for the authorities do not chorus in unison the nature of that fraud which will subvert a judgment. The uncertainty, though, is nothing to that which invests the significance of the expression "surprise." So far as the authorities go at present, the cases in which a judgment is affected by fraud could be summarised as follows. (1) Where two of the parties to an action, apparently hostile, concertedly deceive the court to the detriment of a third party to the action.[24] (2) Where two persons agree together to bring an action, and pretend as plaintiff and defendant respectively to be hostile to the detriment of some other person substantially interested in the subject-matter of the action.[25] (3) Where the officer of the court states in evidence what he knows to be false, and the party detrimentally affected has no means available then and there to refute him.[26] (4) Where a party makes fraudulent misrepresentations to a court, and it is reasonable for the person detrimentally affected not to have been there to refute them.[27] (5) Possibly a judgment may be upset for fraud where, unknown to the court or the party detrimentally affected, it is based on the validity of a document which turns out to have been a forgery.[28] (6) A judgment of a domestic court cannot be set aside merely because it was given on the hypothesis that a certain witness was telling the truth, whereas he turns out to have perjured himself,[29] but the rule is at any rate to some extent otherwise when domestic enforcement of foreign judgments is being resisted.[30]

24 See *Wele* v. *Courtenay* (t. Hen. 5) 2 Cal.Proc.Ch. 8; *Box* v. *Bank* (t. Edw. 4) 2 Cal.Proc.Ch. 70; *Bosanquet* v. *Graham* (1843) 6 Q.B. 601n; *Philipson* v. *Earl of Egremont* (1844) 6 Q.B. 587.

25 See *Kennedy* v. *Daly* (1804) 1 Sch. & L. 355; *Giffard* v. *Hort* (1804) 1 Sch. & L. 386; *Carew* v. *Johnston* (1805) 2 Sch. & L. 280; *Gore* v. *Stacpoole* (1813) 1 Dow 18; *Colclough* v. *Bolger* (1816) 4 Dow 54; *Mullins* v. *Townsend* (1831) 2 Dow & C. 430; *Bradley* v. *Eyre* (1843) 11 M. & W. 432.

26 See *Loyd* v. *Mansell* (1722) 2 P.Wms. 73; *Flower* v. *Lloyd* (1877) 6 Ch.D. 297; (1879) 10 Ch.D. 327.

27 See *Slefeld* v. *Grafton* (t. Edw. 4) 1 Cal.Proc.Ch. 97; *Tommey* v. *White* (1853) 4 H.L.C. 313; *Patch* v. *Ward* (1867) L.R. 3 Ch.App. 203.

28 See *Aylmer* v. *Bishop of London* (t. Eliz. 1) 1 Cal.Proc.Ch. 144; *Tilley* v. *Wharton* (1700) 2 Ver. 378; *Barnesly* v. *Powel* (1748) 1 Ves.Sen. 119; *Imray* v. *Magnay* (1843) 11 M. & W. 267; *Shattock* v. *Carden* (1851) 6 Ex. 725; *Priestman* v. *Thomas* (1884) 9 P.D. 210; *Cole* v. *Langford* [1898] 2 Q.B. 36; *Nixon* v. *Loundes* [1909] 2 I.R. 1; *Kinch* v. *Walcott* [1929] A.C. 482.

29 See *Robson* v. *Eaton* (1785) 1 T.R. 62; *Baker* v. *Wadsworth* (1898) 67 L.J.Q.B. 301; *Everett* v. *Ribbands* (1946) 175 L.T. 143; Cheshire, *Private International Law*, 4th ed., pp. 625–7; Kerr, *Treatise on the Law of Fraud and Mistake*, 7th ed., p. 417; Seton, *Forms of Judgments and Orders in the High Court and Court of Appeal*, 6th ed., p. 859.

30 See Cheshire, *Private International Law*, 4th ed., pp. 627–30, and authorities cited by him.

So much for the occasions on which a judgment is vulnerable as having been obtained by fraud. But is there some other way in which a judgment may be obtained—by "surprise"—which will render it liable to attack? In *Hip Foong Hong* v. *H. Neotia & Co.*[31] Lord Buckmaster, giving the opinion of the Judicial Committee of the Privy Council, said: "In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud." Earlier, he had said: "Fraud or surprise or both are the ground of the application in the present case. . . ." From these passages one would gather that a party seeking a new trial on the ground that there is further evidence reduces the qualifying weight needed on the part of that evidence by showing surprise; that surprise is different from fraud; and that surprise does not reduce the qualifying weight as much as fraud does. On the other hand, it does not appear that surprise will do as a basis for a fresh action to set aside a judgment. What, then, is this surprise?

The *Hip* case does not actually give much to go on as to the meaning of "surprise" in the context. "Surprise" is in fact an odd job word which crops up every now and again when counsel wishes to obtain equitable relief for his client but is bereft of any other idea as to what to call it. In the result the appellation scarcely ever has the magical effect desired. The typical judicial attitude is that evinced by Lord Keeper Somer in *Earl of Mountague* v. *Earl of Bath*[32]: "Now, for this Word (Surprize) it is a Word of a general signification, so general and so uncertain, that it is impossible to fix it; a Man is surprised in every rash and indiscreet Action, or whatsoever is not done with so much Judgment and Consideration as it ought to be: but I suppose the Gentlemen who use that Word in this Case, mean such Surprize as is attended with Fraud and Circumvention; such a Surprize indeed may be a good ground to set aside a Deed so obtain'd, in Equity, and hath been so at all Times; but any other Surprize never was, and I hope never will be, because it will introduce such a wild uncertainty in the Decrees and Judgments of the Court, as will be of greater Consequence than the Relief in any Case will answer for."[33]

[31] [1918] A.C. 888, 894.

[32] (1693) 3 Ch.Cas. 55, 114–5.

[33] For comments on the meaning of "surprise," see, *e.g.*, Bigelow, "Definition of Fraud," 3 L.Q.R. 419, 425; Fonblanque, *Treatise of Equity*, 5th ed., p. 125; Hovenden, *General Treatise on the Principles and Practice by which Courts of Equity are guided as to the Prevention or Remedial Correction of Fraud*, Vol. 2, p. 12; Pollock, *Principles of Contract*, 10th ed., pp. 629–32.

Strangely enough one meaning with which the word " surprise " became fixed, to the extent of being virtually a technical term, was with regard to legal proceedings: the enrolment of Chancery decrees. A decree was said to have been enrolled by surprise in certain circumstances when the enrolment took place too soon after the decree had been awarded. The enrolment could then be undone. The earliest reported case, an anonymous one,[34] was a motion for the rehearing of a cause in which the decree had been signed and enrolled. It was held that it could be reopened if the enrolment had been gained by surprise, though it was not said what surprise was considered to consist of. A similar motion occurred in a later anonymous case,[35] where the decree was alleged to have been too quickly enrolled. Lord Hardwicke said: " I never knew greater dispatch than in the present case; therefore, though it is strictly regular, yet being so quick, it is within the reason of the common law courts, setting aside judgment every day, as on surprise; although they are strictly regular." Daniell[36] notes the doctrine of surprise in relation to enrolment, but does not say what surprise is.

Enrolling decrees has been abolished by the Judicature Acts. Before these Acts were passed, enrolment ended the proceedings in the court of first instance. It prevented rehearing or the raising of any point which might subsequently arise, *e.g.*, when taking an account ordered by the decree. On the other hand, there could be no appeal to the House of Lords before enrolment. Legally, enrolment could be delayed by entering a caveat, and in the absence of any entry the successful party could enrol whenever he liked after the decree had been pronounced. In practice, however, it was usual to give notice before proceeding to the enrolment of a decree.

The older cases are not clear as to whether undue speed in enrolment was itself a surprise constituting a ground of relief, but at any rate, in *Stevens* v. *Guppy*[37] Lord Eldon stated that he had " no difficulty in saying that it is a surprize, if the party enrolling the decree has said that, which might lead the other party to believe, that the decree would not be enrolled." Lord Lyndhurst, in *Barnes* v. *Wilson*,[38] held that for relief on the ground of surprise there must be circumstances of the kind mentioned by Lord Eldon, and that mere omission to give notice of intention to enrol would not do (though of course, the enrolment may well take the other party unawares). This position was adhered to in *Balguy* v.

[34] (1682) 1 Vern. 131.
[35] (1749) 1 Ves.Sen. 326.
[36] *Chancery Practice*, 6th ed., p. 817.
[37] (1823) Turn. & Russ. 178, 179.
[38] (1830) 1 Russ. & My. 486.

Chorley[39] by Lord Brougham, *Dearman* v. *Winch*[40] by Lord Cottenham, *Enraght* v. *Fitzgerald*,[41] *Williams* v. *Page*[42] by Lord Cranworth, *Wildman* v. *Lade*[43] and *Pearce* v. *Lindsay*[44] by Lord Chelmsford, and by the Court of Appeal in Chancery in *Hill* v. *South Staffordshire Ry.*[45] Lord Truro's decision in *Hargrave* v. *Hargrave*,[46] so far as it decided the contrary, was probably wrong. The only complaint in that case was that the decree was enrolled by the plaintiff without notice to the defendant, which notice the defendant naturally expected. The Lord Chancellor said[47]: "I therefore think it passed by surprise, and the enrolment consequently must be vacated." He said that no *mala fides* was required, and that it was sufficient if the surprise resulted from a misapprehension on the part of the plaintiff's legal advisers as to the proper course.

The enrolment cases are obsolete, but they may give some guidance as to what is meant by "surprise" in relation to judgments, and moreover their existence may account for Lord Buckmaster's use of the word in the *Hip* case. Underhanded dealings of some kind seem to have been an ingredient, yet this kind of surprise was not a variety of fraud, which does not generally include failure to carry out a stated intention. It was surprise to lead the other party to believe that the decree would not be enrolled, and then to take advantage of him by enrolling it behind his back. If parallel circumstances could occur in relation to a judgment today, no doubt they would be regarded as sufficient grounds for ordering a new trial. What Lord Buckmaster had in mind in the *Hip* case seems to indicate use of "surprise" as denoting the reason why the evidence which is now put forward as further evidence was not adduced at the trial.

What the appellants complained of in the *Hip* case was that the respondents—who were defendants in the Supreme Court for China in an action for breach of opium contracts—had been guilty of so arranging their case at the trial that certain important evidence was not before the court. The defendants had failed to produce a material book, and had alleged at the hearing that no other books bearing on the matter existed beyond those they disclosed. They had suppressed a telegram which contradicted the testimony of one of the defence witnesses. They paid another

[39] (1834) 1 My. & K. 640, 641–2.
[40] (1839) 4 My. & Cr. 550, 551–3.
[41] (1841) 1 Dr. & War. 72.
[42] (1857) 1 De G. & J. 561, 564.
[43] (1859) 4 De G. & J. 401, 405 ("An enrolment ought not to be vacated except upon strong grounds of surprise, or something approaching deception or *mala fides*").
[44] (1859) 4 De G. & J. 211.
[45] (1864) 2 De G. J. & S. 230.
[46] (1851) 3 Mac. & G. 348. And see *Fryer* v. *Davies* (1866) L.R. 1 Ch.App. 390.
[47] 3 Mac. & G. 352.

witness 56,000 taels to give evidence for them. Yet another witness, the compradore, was promised 5 per cent. interest from the result of the litigation. Two other witnesses had been told what to say (now alleged by their affidavits to be untrue). A new trial was refused on the ground that the decision would not have been different anyway. That certainly disposes of the matter, but one would have thought by the way that dishonesty had been shown. The comment of Lord Buckmaster, however, is astonishingly mild [48]: "Their Lordships regard with great disfavour the method of obtaining evidence which these documents disclose; but they are unable to find that even if the purpose was dishonest—and there is not sufficient material before them to decide that issue one way or the other—the dishonesty produced any result that had the least effect upon the mind of the learned judge who heard the case."

The Board then said that no case of fraud had been made out. On the other hand they did not say there was no surprise. One is thus left in considerable doubt as to surprise. Had a case of fraud been shown, apparently, the new trial would, or at least could, have been ordered even though the further evidence was of a minor character. Had the further evidence been credible and conclusive, it would not have been necessary to allege fraud or surprise. The refusal of a new trial in the *Hip* case may mean (1) that there was no surprise, or (2) that the further evidence was not of a sufficiently weighty character to order a new trial even if it was not available at the first trial because of surprise, or (3) that there were both these deficiencies.

Surprise in judicial proceedings may mean taking a party unawares by some underhanded device: that is what it meant in the old enrolment cases. If this is done by fraud, it is enough to call it fraud. If it is not done by such fraud as enables a judgment to be set aside, it will generally not be a ground of redress, as, for example, where there is perjury (which there was in the *Hip* case). It is submitted that there is redressible surprise not amounting to fraud, if there is such a thing at all, where a party is materially hindered in presenting his case by an unfulfilled undertaking given by the other party. This may be an express undertaking, or merely a failure to announce that he is not going to do something he would be automatically expected to do. Suppose that in a criminal case the defence wish certain documents to be put in; counsel for the prosecution promises to put them in so that the only evidence for the defence will be the oral testimony of the accused himself; the documents are handed to counsel for the prosecution before the trial; at the hearing he does not produce

[48] [1918] A.C. 893.

them. There, it is suggested, is a case of surprise. If this is the correct meaning to assign to "surprise," then it would appear to have been absent in the *Hip* case.

The *Annual Practice*,[49] though it does not mention the *Hip* case and contains no attempt to define surprise, cites a couple of helpful cases. First, the proposition that surprise is hindrance in presenting a case by failure to fulfil an undertaking is supported by the Court of Appeal decision in *Isaacs* v. *Hobhouse*.[50] This was an application for a new trial on the ground of surprise. Bankes L.J. (with whom Warrington and Scrutton L.JJ. agreed) said [51] there was little authority and the court ought to be slow to accede to such an application. He went on: "There may be cases in which the court will grant relief; but the party must first establish the existence of surprise, and then he must establish that he has not elected to proceed with the materials at his command. He must further satisfy the Court that there is relevant evidence available which will be likely to affect the result if a new trial is granted." He held that the plaintiff had been surprised by the defendant putting forward evidence contrary to what the plaintiff thought to be admitted, but that the other elements were absent, and so a new trial was refused. Secondly, the proposition that the undertaking may be tacit is supported by *Jones* v. *S. R. Anthracite Collieries, Ltd.*,[52] also decided by the Court of Appeal. A person served by the plaintiff long before the trial with a *subpoena duces tecum* lay doggo until the trial, when he announced (no doubt with the air of a man holding five aces) that the document was in someone else's possession. The plaintiff's application for an adjournment having been unsuccessful, he was granted a new trial.

Then, if a case of surprise is made out, what is the mode of relief? In the *Hip* case, it was said that a new trial could be ordered, and this is supported by *Isaacs* and *Jones*. Presumably an appeal could also be allowed in some other way than granting a new trial, as by reversing the decision below (which is what would have to be done in a criminal case). However, the time for appealing having passed, can a new action be brought to set aside a judgment, as is the correct procedure in cases of fraud? Against it can be said, first, that there would appear to be no stronger case for allowing such an action in cases of surprise than in cases of perjury, and secondly, that no such action is reported as ever having been brought.

[49] See *Annual Practice*, 1954, title *New Trial, Surprise*, p. 700.
[50] [1919] 1 K.B. 398.
[51] [1919] 1 K.B. 405–7.
[52] (1920) 124 L.T. 462. And see, as analogies, *Dickenson* v. *Fisher* (1887) 3 T.L.R. 459; *Holden* v. *Holden* (1910) 102 L.T. 398.

The whole subject is uncertain. This state is probably the result of a combination of several factors. There is the traditional reluctance of judges and writers to define fraud, so (it is optimistically thought) making it difficult for dishonest people to keep just technically on the right side of the law while carrying out their nefarious purposes. Secondly, there is the tactic of pleaders (now apparently out of fashion) in using such ill-defined expressions as "surprise" when not so sure that they can establish fraud. Thirdly, malpractices in legal proceedings seem to be happily rare. Perhaps the uncertainty will remain for good.

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THE BURDEN OF PROOF IN BIGAMY

Although the problems of burden of proof are of great importance both to the theory and to the practical administration of the criminal law, there is a dearth of authority dealing with them. Nor are even the fundamentals secure—in *Woolmington* [1] the House of Lords affirmed, with sweeping strokes, that "no matter what the charge or where the trial" the burden of proving the guilt of the prisoner lies on the prosecution; but the rules for applying this broad principle have not been worked out for several crimes, and certainly not for the crime of bigamy discussed in this note. Further, the expression "proof beyond reasonable doubt," as describing the weight of the burden when it lies on the prosecution, which had been put to innumerable juries without challenge, was recently expressly disapproved by Goddard L.C.J. who in *Summers* [2] recommended alternative formulations which are, with respect, no less free from ambiguity, though they probably in practice lighten the burden upon the prosecution. It is, however, clear that in *Woolmington* and later in *Mancini* [3] the Lords had in mind "proof beyond reasonable doubt" and that there is, therefore, conflict between these cases and *Summers*.

In *Broughton* [4] the Full Court of the Victorian Supreme Court dealt with one aspect of this larger unsettled topic on which no direct authority whatsoever was to be found. Section 61 of the Victorian Crimes Act, 1928, closely follows the terms of the last English statute defining the crime of bigamy, the Offences against the Person Act, 1861,[5] s. 57. The Victorian statute provides that—

> "Whosoever being married goes through the form of marriage with any other person during the life of her or his husband or wife, shall be guilty of felony, and shall be liable to imprisonment for a term of not more than five years. Nothing in this section contained shall extend to any person going through the form or ceremony of marriage as aforesaid whose husband or wife has been continually absent from such person for the space of seven years then last past and has not been known by such person to be living within that time; or shall extend to any person who at the time of her or his going through such form or ceremony of marriage has been divorced from

[1] [1935] A.C. 462.

[2] (1952) 36 C.A.R. 14. Recent cases on the burden of proof are examined by Glanville Williams, "The Direction to the Jury on the Burden of Proof" [1955] Crim.L.R. 464.

[3] [1942] A.C. 1.

[4] [1953] Victorian Law Reports 572.

[5] 24 & 25 Vict. c. 100.

the bond of marriage; or to any person whose marriage at such time has been declared void by the sentence of any court of competent jurisdiction."

The issue raised in *Broughton* was—on whom lies the burden of proving or disproving the seven years' absence referred to in the proviso to the statute?

At the trial, the jury were directed that although the burden of proving knowledge rested on the Crown, the burden of proving absence for seven years lay on the accused and that he was bound to establish this on the balance of probability. Broughton was convicted. He applied to the Full Court (Lowe A.-C.J., Gavan Duffy and Barry JJ.), for leave to appeal against conviction, the main ground of his application being an attack on this statement of the burden of proof. In the result the application was granted, the appeal allowed, and a retrial ordered. Though the three members of the court concurred in the order, Gavan Duffy J. disagreed sharply on the question of the burden of proof. Lowe A.-C.J. and Barry J. placed the ultimate burden of proof on the prosecution, holding that the first exemption in the proviso to the statute "is one which gives rise to a single defence which contains two co-existing elements: absence of the other spouse for seven years then last past, and absence of knowledge on the part of the accused that the other spouse was living within that time."[6] Gavan Duffy J. dissented strongly, holding it to be incumbent upon the accused, if he is to escape conviction, to establish the seven years' absence on the balance of probability.

It is remarkable how this issue is skirted in the major texts. It is avoided completely in Archbold,[7] Roscoe,[8] Russell,[9] Halsbury,[10] and Harris and Wilshere[11]; carefully left undecided by Wigmore[12]; and only mentioned inferentially in Stephen's *Digest*,[13]

[6] [1953] Victorian Law Reports 574.
[7] 32nd ed., pp. 1349–50.
[8] 16th ed., at p. 413.
[9] 10th ed., Vol. 1, at p. 880.
[10] 2nd ed., Vol. 9, at pp. 389–90.
[11] 18th ed., at p. 204.
[12] 3rd ed., Vol. 9, p. 371. Wigmore writes that "no successful generalization is yet accepted" on this and kindred issues but cites six long columns of "some of the more complicated and interesting cases." Later he stresses the difficulty of the particular question faced in *Broughton*, describing as "a timid and inefficient way to deal with the situation" (*Ibid.*, p. 478) the statutory provision exculpating one accused of bigamy after the seven years' absence without knowledge of the first spouse and arguing that what is needed is a proceeding by which the deserted spouse can for purposes of avoiding a charge of bigamy obtain a judicial declaration of the other spouse's death.

This suggestion is akin to the practice in certain continental systems, for example, the German, which provides for a judicial declaration of death of a person who has been missing for a protracted period—in general, 10 years. The provisions covering the situation where the person so declared later returns are interesting. Art. 39 of the German law of July 4, 1939, enables the deserted partner of the first marriage to demand the dissolution of the second

[13] 8th ed., at p. 278.

Kenny,[14] and Cross and Jones.[15] These latter would all appear to disagree with the decision later reached in *Broughton* and seem to place the burden of proving such absence on the accused; but the question goes almost by default. Professor Glanville Williams in his *Criminal Law* [16] allocates only a few lines to this question, but reaches a conclusion contrary to that of the other commentators and in accord with the majority in *Broughton*. The textbooks thus give little guidance, and, as will be seen, a reading of the case law on this subject does not fill this gap and discourages the affirmation of any fixed views.

Despite this lack of authority, some points are clear and are best disposed of as a preliminary to treating the central issue in *Broughton*.

It is clear that " the Crown sufficiently launches its case against the accused in a charge of bigamy by leading evidence that the accused, being lawfully married, has gone through the ceremony of marriage with another person, the other party to his marriage being then alive." [17] The proviso only becomes relevant if some evidence is advanced concerning the categories of exemption which it covers; such evidence may be advanced by either the Crown or the defence, but will more usually fall to the latter.

Further, it is a truism that the phrase " burden of proof " is sometimes used to refer to the evidentiary burden of adducing evidence at a particular stage of the trial and sometimes to the ultimate obligation of establishing guilt or innocence, all the evidence having been presented. Thus, though the burden of bringing to the attention of the court evidence attracting the operation of the proviso may lie upon the defence, this is, in view of the broad rule asserted in *Woolmington*, an irrelevancy in determining where lies the ultimate burden of persuasion.[18]

It is also clear that the ultimate burden of proving beyond reasonable doubt that the accused knew of the existence of the first spouse, once the seven or more years' absence is not in issue, lies upon the prosecution. There is abundant authority for this,

marriage should the first spouse reappear; however, if this course is followed the person so demanding can—during the lifetime of the unexpectedly returned spouse—enter a " new " marriage only with the latter. The mere reappearance of the first spouse judicially declared dead does not invalidate the second marriage. Compare Arts. 87 *et seq.* of the French Civil Code (October, 1945) and Arts. 35 *et seq.* of the Swiss Civil Code, neither of which make such extensive provisions for this situation.

The model statute Wigmore recommends has the defect of assisting only the deserted and not the deserting spouse; it is submitted that it is preferable not to endeavour to draw morally oriented distinctions between them for this purpose.

14 16th ed., at p. 173.

15 3rd ed., at p. 281.

16 *Criminal Law: The General Part*, London, 1953, pp. 718–9.

17 *Per* Lowe C.J. and Barry J., [1953] Victorian Law Reports 573.

18 For a full analysis of these two meanings of " burden of proof " see Wigmore on *Evidence*, 3rd ed., Vol. 9, pp. 270–86.

culminating in the decision of the Court for Crown Cases Reserved in *Curgerwen*,[19] which was based essentially upon the undesirability of requiring the defence to establish a negative proposition.

There is also compelling authority that if the accused honestly (and, probably for this crime, also reasonably) believes that his first wife is dead the offence of bigamy will not have been committed even though he is mistaken in this belief and seven years have not run since the accused last saw his wife. This proposition is supported by the leading case of *Tolson*[20] in England and by the decision of the High Court in *Thomas*[21] in Australia. The burden of proof of satisfying the jury of the honesty (and, less certainly, the reasonableness) of his mistake lies on the accused.

What is not clear, and what was apparently not decided by any English or Australian court until *Broughton*, is the question of the ultimate burden of proof of the seven years' absence. If it lies upon the prosecution it will presumably require proof beyond reasonable doubt; if it lies upon the defence it can hardly require more than proof on the balance of probability; but where does it lie? *Broughton* gives the answer for Victorian courts. But the issue is so open that it is perhaps best if both possible answers are sketched.

The argument for placing this burden on the prosecution rests on the fundamental principle enunciated in *Woolmington*. It is the invariable practice in common law offences to place this burden on the prosecution and it has frequently been held that unless there are the clearest reasons or terms of a statute to the contrary the same rule should be applied to statutory offences. It is argued that bigamy cannot appropriately be regarded as a statutory exception to this principle, particularly in the light of the liberal interpretation this statute received in *Tolson* and in view of the decision in *Curgerwen*. Further, with a statute of this antiquity —dating as it does from 1604—the presumption is extremely strong that it should be interpreted in line with the general principles of the common law.[22]

There is some support for this line of argument to be found in the cases. In *Heaton*,[23] Wightman J. held at *nisi prius* that the burden of proof that a prisoner charged with bigamy has not been continuously absent from his wife for seven years or that she was known to him to be living within that time lies on the prosecution. The only evidence before Wightman J. in that case was that of

19 (1865) L.R. 1 C.C.R. 1.
20 (1889) 23 Q.B.D. 168.
21 (1937) 59 Commonwealth Law Reports 279.
22 In *Thomas*, Dixon J. spoke of the "reasonable doctrine that when a statute introduced into our criminal code a new offence it should be understood prima facie to intend the offence to take its place in a coherent general system and to be governed by the established principles of criminal responsibility." (1937) 59 Commonwealth Law Reports 279 at 304.
23 (1863) 3 F. & F. 819.

a prosecution witness who was present when the prisoner married his wife, eleven years prior to his second "marriage," and who also gave evidence that the prisoner had lived with his wife for some years. She was still alive. The witness could not, however, say how long the prisoner had lived with his wife. He agreed it might be four years; but he really was not sure. At this point Wightman J. asked of Maule who appeared for the prosecution "Can you carry the case any further? This evidence is not enough." Maule replied, accurately, that in *Mary Briggs*[24] Coleridge J. had held, at first instance, that the onus of proof in a case of this kind was on the prisoner. Wightman J., without referring to the earlier authority, held that "there was no evidence that the prisoner and his wife had lived together within the seven years, or that he knew she was alive. There was evidence of their marriage eleven years ago, but no evidence how long he had lived with his wife after the marriage. In that case the verdict must be not guilty."

In *Curgerwen* Chief Baron Pollock, delivering the judgment of a court consisting of himself, Pigott B., and Willes, Shee and Montague Smith JJ., which placed on the prosecution the burden of proving the accused's knowledge of the continued existence of the first spouse, held that "we think that it is contrary to the general spirit of the English law that the prisoner should be called on to prove a negative; and that it is better, and more in agreement with the general doctrine and principles of our criminal law, to adopt the rule laid out by Wightman J. in *R.* v. *Heaton*." This placing on the prosecution the burden of proving that the accused was aware of his wife's existence within seven years before the second ceremony in *Curgerwen* has not been challenged. It has the practical effect of not requiring that one accused of bigamy and setting up this defence should have actively inquired concerning his wife during this period.

Heaton dealt predominantly with the absence issue in the proviso, though Wightman J. based his decision largely upon the impossibility of proving a negative which would concern only the knowledge issue. *Curgerwen* turned exclusively on the proof of the accused's knowledge of the continued existence of his wife, the fact of seven years' absence being agreed. Nevertheless the Court for Crown Cases Reserved in the latter case purported to accept the more widely expressed ratio of *Heaton* and would appear to have held that the same rule concerning the burden of proof should apply to both limbs of this defence.

The contrary argument—for placing the burden of proof of absence upon the accused—is, it is submitted, less persuasive. It is based on an antique and over-technical rule of statutory interpretation by which a distinction is made between statutory

[24] (1856) Dears. & Bell 98.

provisions creating liability which include within the formulation of the offence the definition of the grounds of liability, and those where, the grounds of liability having been defined, a proviso is added introducing matters of exception or excuse. Concerning the latter the rule was that it lay upon the party who sought to bring himself within the exceptions or qualifications to undertake the burden of establishing that he fell within their ambit. This is a distinction that pays greater regard to form than to substance; but it was one that became established and relied upon in many different contexts.[25] It would in effect, make the pleadings concerning the proviso to the bigamy statute take the form of a confession and avoidance, and as such would place the burden of proof upon the defence. Of course, *Curgenven* prevents one applying this rule in its amplitude but *Curgenven* depends, so the argument goes, upon the impossibility of proving a negative and should not be extended to apply to the proviso as a whole.

Some authority for this argument is also to be found in the cases. In *Tolson* five judges, some of the majority and some of the minority, expressed themselves in terms which would support it. Thus Cave J., with whom Day and Smith JJ. concurred, said, "What must she prove to bring herself within the proviso? Simply that her husband has been continuously absent for seven years."[26] Denman J., with whom Field J. concurred, said that the statute "was intended to provide, and does provide, that any person who marries another (his or her wife or husband as the case may be being at the time alive) does so at his or her peril; and can only make good a defence to a prosecution for bigamy by proving a continuous absence for seven years."[27] But these dicta in *Tolson* lose much of their apparent significance when we recall the essential difference between the issue faced in that case and the one under discussion. They are merely incidental and possibly insufficiently considered references to a problem concerning the burden of proof which was not essential to the decision in *Tolson*.

Prior to *Tolson* there was the case of *Mary Briggs*[28] which Wightman J. had brushed aside in *Heaton*. In *Mary Briggs* Pollock C.B., Coleridge and Willes JJ., Bramwell and Watson BB.,

[25] See, for example, Lord Mansfield C.J. in *Jarvis* (1754) 1 East 643 n. at 646 n.: "It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them." In *Audley* [1907] 1 K.B. 383 the Court for Crown Cases Reserved accepted this distinction with regard to the necessary content of an indictment for bigamy. These cases, though important with regard to the averments necessary to a complete indictment, would seem to have little relevance to the burden of proof in a trial pursuant to a valid indictment.

[26] (1889) 23 Q.B.D. 168 at 183.

[27] *Ibid.*, at p. 201.

[28] (1856) Dears. & Bell 98.

expressly refused to decide this question of the burden of proof, though conceding its importance. In their discussion with counsel, however, they went a long way towards accepting the argument of Power for the prisoner "that the onus of proof lies first on the Crown to prove the second marriage; then it is for the prisoner to show a continuous absence for seven years, and when this is done the onus is again shifted, and it is for the Crown to show that the former husband or wife have been known by the prisoner to be living within that time."[29] *Heaton* and *Curgerwen* did not effectively dispose of these propositions since they too readily grouped together the two limbs of this proviso.[30]

When this argument is advanced *Woolmington* can be circumnavigated in two ways. First it can be argued that it requires the proof by the prosecution of every ingredient of the offence but not of excuses by way of mistake of fact which must be pleaded by way of confession and avoidance. Thus an honest (and, possibly, reasonable) belief on the part of the accused of the death of the first spouse must lead to an acquittal on a charge of bigamy; but it is clear that it lies upon the accused to satisfy the jury on the balance of probabilities that he or she did hold this belief. A similar rule can be suggested as applying to this issue of absence for seven years. If this technique of avoiding the principle in *Woolmington* be rejected as spurious, then it is still possible to argue that the proviso in the bigamy statute is excluded from the rule in *Woolmington* by the Lord Chancellor's words in that case "subject also to any statutory exception."

One apparently cogent argument in favour of resting this burden upon the accused is that of convenience. He is the best informed of all, apart from his wife, as to the period of separation between them; in that the wife is not a compellable witness it is placing a very onerous burden upon the prosecution to establish this element beyond reasonable doubt. But even this argument of convenience is weak for it tends to confuse the evidentiary burden of proof and the ultimate burden of proof. It is more than convenience, it is essential, that on the defence should lie the burden of adducing genuine evidence and not merely hypothetical surmise to raise the issue of the proviso to the statute if the prosecution chooses not to raise it, just as one accused of murder must so raise the issues of accident or provocation if he desires them to form part of the trial; but, as *Mancini* showed, the ultimate burden of disproving accident or provocation rests

[29] *Ibid.*, at 100.

[30] An *obiter dictum* supporting this interpretation is that of Bigham J. in *Audley* [1907] 1 K.B. 383 at 387:—"the matters specified in the proviso to s. 57 are all matters of confession and avoidance and they must be alleged and proved by the defence."

on the prosecution. There is no unreasonable inconvenience in letting the same be true with respect to the issue of seven years' absence in a bigamy trial.[31]

As further rebutting this argument of convenience it is to be remembered that before the Criminal Evidence Act, 1898, one charged with bigamy could not give evidence on his own behalf —nor could his wife.[32] Bigamy was statutorily proscribed centuries before this when to travel from one village to another was an adventurous undertaking and when local knowledge of bigamous relationships and of where individuals had resided would have greatly facilitated proof of these issues. Nevertheless, prior to 1898, to cast such a burden of proof on the accused would have been to encumber him unfairly.

It is occasionally said that this proviso to the statute raises a "presumption of death" upon seven years' absence being proved,[33] and there does exist for several legal purposes, particularly with regard to the devolution of property, a presumption of death arising from long absence. It is submitted that in the context of the bigamous marriage to talk of a presumption of death may be confusing, or if there is an evidentiary presumption here it is the presumption of continuance and the proviso to the statute merely varies it for this purpose. Indeed, the history of this legislation reveals that the idea of the presumed death of the first spouse was hardly relevant. Bigamy was originally a very different ecclesiastical offence, first proscribed as a felony in England in 1604 by 2 Jac. 1, c. 11, which phrased the proviso we are considering as follows:

> "Provided always that this act nor anything therein contained shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within His Majesty's Dominions, the one of them not knowing the other to be living within that time."

This infelicitously expressed provision was varied in 1828 by 9 Geo. 4, c. 31, s. 22, to approximately its present form. In its original formulation, certainly as regards the spouse who had departed overseas, any presumption of death was not germane to the issue,

31 There is an analogy in respect of confessions. There the burden rests on the Crown to prove voluntariness only when some circumstance pointing to inducement is shown by the evidence. See *Martin* (1909) 9 Commonwealth Law Reports 713 at 722 and at 731–2.

32 His second "wife," of course, could give evidence.

33 See for example *Wheat* [1921] 2 K.B. 119 at 125 where the Court of Criminal Appeal explains *Tolson's* case using this "presumption of death" explanation of the proviso to the statute. In *Thomas*, Latham C.J. cogently criticises this analysis of *Tolson* —(1937) 59 Commonwealth Law Reports 279 at 290.

for no offence was committed if the first spouse had been overseas for seven years even if he or she was known by the accused to be living at the time of the second ceremony.

All, then, that the proviso does, in terms of evidentiary presumptions, is to vary the general presumptions of continuance once *some* evidence of seven years' absence is advanced. This is the explanation of *Jones*,[34] which is also a good example of the fact that the evidentiary burden of leading evidence on this issue rests on the defence. In *Jones* the prosecution proved that the accused had married A in 1865; that he had lived with her after the marriage for a period which was not known; that in 1882, while A still lived, the accused had gone through a marriage with B. No evidence was advanced at all as to whether the accused and A had ever separated and, if so, when this occurred. It was held that the prisoner was rightly convicted, Lord Coleridge C.J. saying: "There is proof of the existence of a state of things (the marriage) and no evidence of the cessation of that state of things, consequently the presumption is that the existing state continued. That presumption could only have been displaced by evidence and no evidence displacing it was forthcoming." Thus an evidentiary burden lay on Jones if he was to escape conviction; but this fact, as we have seen, did not touch the question of the ultimate burden.

In his *Criminal Law* Professor Glanville Williams writes: "If the accused gives evidence that he and his wife separated seven years before his second marriage, and if the jury are not satisfied beyond reasonable doubt that this evidence is false, it is incumbent on the prosecution to prove that during that period the accused knew his wife to be alive." For these propositions he cites *Curgerwen* in a footnote. It is submitted that in this sentence the true position is stated; that the evidentiary burden concerning seven years' absence lies upon the accused; that the ultimate burden of disproving absence or proving knowledge lies upon the prosecution; that *Curgerwen* is not really good authority for any proposition concerning the proof of absence, being confined by its facts to the question of knowledge; and that the majority judgment in *Broughton* is the first authoritative guidance on this issue.

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[34] (1883) 11 Q.B.D. 118.

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THE CAPACITY OF AN INFANT TO APPOINT AN AGENT

Dr. Powell in his treatise on the *Law of Agency* must have exercised the foresight of a Hebrew prophet when he wrote "Whether an infant can appoint an agent in other cases cannot be stated with any certainty,"[1] for Denning L.J. has certainly cast doubts on this question in a passage in his judgment in *Shephard* v. *Cartwright*.[2] He says: ". . . the appointment by an infant of an agent . . . has always been held void. It has been the law of this country for many centuries that an infant cannot appoint an agent to act for him, neither by means of a power of attorney, nor by any other means. If he purports to appoint an agent, not only is the appointment itself void, but everthing done by the agent on behalf of the infant is also void and incapable of ratification. The reason for this rule is because an infant has not sufficient discretion to choose an agent to act for him. He is all too likely to choose the wrong man; and so the law, rather than have any argument upon the point, declares him to be incapable of choosing an agent at all. If he is to enter into any legal transaction, he must enter into it by himself and not by an agent, and then the law will look into the transaction and see whether it is binding on him or not. This distinction—between a transaction entered into by the infant himself and one entered into by an agent on his behalf—is taken in all the books. It is taken by Lord Mansfield L.C. himself in the leading case of *Zouch* v. *Parsons*[3] where he says that the powers of attorney given by infants are void; and also all deeds by an infant which 'delegate a mere power and convey no interest'. The same distinction is taken by Baron Parke in *Doe* d. *Thomas* v. *Roberts*,[4] where he said; 'An infant cannot appoint an agent . . . an agreement by an agent cannot bind an infant.'" While it is not for one moment suggested that the power of attorney and the two written authorities given by the (then) infant plaintiff, Richard Cartwright, were, on the facts, anything other than void, it is respectfully submitted that the Lord Justice's statement has some unexpected results and that certain cases appear not to bear it out in all respects. According to his view we are, apparently, to assume that both the contract between an infant principal and his purported agent and any contract between the infant principal and the third

[1] At p. 242. He says "other" because he has adverted to the Law of Property Act, s. 129 and to *R.* v. *Longnor* (*Inhabitants*) (1833) 4 B. & Ad. 647.

[2] [1953] Ch. 728, at p. 755 (reversed [1955] A.C. 431, but without reference to this point).

[3] (1765) 3 Burr. 1794 at p. 1804.

[4] (1847) 16 M. & W. 778 at p. 780.

party which has been effected by the instrumentality of the agent are constituted a fourth and fifth type of contract which is rendered void and incapable of ratification in the same way as the three types of contract already statutorily made so by section 1 of the Infants' Relief Act, 1874. It seems, therefore, to be desirable to examine the authorities and decisions on the capacity of an infant to appoint an agent and then to examine the Lord Justice's remarks in the light of the law as it is generally supposed to be.

One statement of the law which accords with that of Denning L.J. is to be found in Simpson on the *Law of Infants* where it is stated "In many cases an instrument or act is held to be a nullity, because it must from its own nature be regarded as prejudicial, either by the doctrine of the law or the enactment of a statute. Thus it is a general rule that an infant cannot appoint an attorney or an agent.[5] Such an appointment is void; consequently any act by such a person is void also as against the infant."[6] The other case relied on by Lord Justice Denning in support of his contention was, as we have seen, *Zouch* v. *Parsons*,[7] but it is submitted with respect that neither case is to be taken as authority for his proposition that no infant can appoint an agent and that no agreement entered into by an agent on behalf of an infant principal can bind the infant. Many writers have stated the law to be otherwise.[8] Halsbury, for instance,[9] states that "subject to certain exceptions, an infant cannot be a principal and the agent cannot bind him in respect of contracts made on his behalf, nor can the infant himself ratify them after majority . . . but . . . an agent can bind an infant in respect of necessaries and also in respect of those contracts which at common law have to be expressly renounced by the infant on

[5] The authority quoted for this is *Doe* d. *Thomas* v. *Roberts* (*supra*). Parke B. at p. 1405 said "A next friend cannot bind an infant, because an infant cannot appoint an agent. If an infant makes a feoffment by letter of attorney, *nil operatur*; otherwise if he make the feoffment in person." At p. 1406, he adds, "An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, nor does his ratification bind him. There is no doubt about the law: the lease of an infant, to be good, must be his own personal act." It would seem that this is an unnecessarily wide statement since it was found as a fact that the plaintiff executor was bringing the action of ejectment "merely as executor, not as authorised agent for the children, but as next friend, and without any authority so to act."

[6] 4th ed. (1926), p. 10. S. 129 of the Law of Property Act (*ante*) is quoted as an exception to the rule as stated.

[7] *Supra*.

[8] See *e.g.*, Story on *Agency*, Chap. II, para. 6, pp. 5–6; Bowstead, 11th ed., Art. 6, page 14: Leake on *Contracts*, p. 325; Sutton & Shannon on *Contract*, 4th ed., Art. 165, p. 402: Powell, *op. cit.*, p. 242: *Restatement of the Law of Agency*, para. 20—all of which are to the effect that an infant is bound by a contract made by his duly authorised agent where the infant would have himself been bound had he personally made the contract.

[9] Simonds edition, *sub tit. Agency*, Vol. 1, para. 354.

attaining majority in order to be rendered void." [10] Suppose, for example, that an infant X, who has attended a dancing academy with some success, employs Y, a reputable theatrical agent, to place her in a show. Can it be reasonably held that, if Y secures a place for her in a show put on by Z Ltd., at a good salary, the contract between X and Z Ltd. is void as well as that between X and Y? Are not both these contracts of that type of infant's contract called "beneficial" as being substantially for the infant's benefit? [11] It is difficult to see why the result should differ merely because of the interpolation of Y. Denning L.J. says it is because "an infant has not sufficient discretion to choose an agent to act for him. He is all too likely to choose the wrong man." [12] This proposition seems to be a somewhat startling one. It is believed that the proper test is not the quality of the agent appointed but of the agency contract at the time it is made. If it is "beneficial," then the contract will stand, as it hoped to show later—and the agent will normally be entitled to his proper remuneration in accordance with the agency contract. Why should Y in the example posited be deprived of a commission merely because X is an infant? If, on the other hand, the agency contract is not "beneficial," it will not stand, and the infant will not be liable upon it. The courts may well be more ready to hold the infant not liable on the agency contract when he has contracted with an agent of doubtful qualities, but this is not to say that the infant may never appoint an agent or that all transactions effected by the agent on the infant's behalf must be void. It can hardly be correct to say that if X did work for Z Ltd. and was not paid for it, she would be unable to sue for remuneration at the contractual rate; yet, if the learned Lord Justice is correct in what he says, X would presumably be forced to recover on a *quantum meruit*.[13] And what the court might hold to be "reasonable remuneration" might be less than what Z Ltd. were prepared to pay under the contract. Should X be so prejudiced? Let us further suppose that an infant P employs a broker, A, to purchase some partly paid shares for him upon the Stock Exchange. It is not lightly to be assumed that A cannot claim any commission on the transaction and that the vendor of the shares still owns them, either beneficially (in which case P can presumably recover the price from him as

[10] The law was so cited—and with apparent approval—to the court in the Canadian case of *Johannson* v. *Gudmundson* (1909) 19 Manitoba Law Reports 83, to which we shall have occasion to refer later. It is perhaps worth noting that the general principle of Australian law on this point is that, "It is a general rule of law that what a person may do himself he may do by an agent." (For this proposition *J. M. Christie* v. *Permewan, Wright & Co. Ltd.* (1904) 1 C.L.R. 693 is cited, though the case is in no way concerned with an infant's agent.)

[11] *Cf. De Francesco* v. *Barnum* (1890) 45 Ch.D. 490.

[12] At p. 755. *Cf. Whitney* v. *Dutch*, 14 Mass. 457 (1817) *per* Parker C.J.

[13] *Cf. Craven Ellis* v. *Canons* [1936] 2 K.B. 403.

money paid under a void contract) or as trustee for P (in which case the vendor will have the inconvenience of having to pay the calls and of requiring P to indemnify him). Yet these are the natural consequences of the rule enunciated by Denning L.J. But, had P dealt direct with the company issuing the shares and A had never entered the picture, there is no doubt that P who have been the owner of the shares and as such have been liable for such calls as might be made on them until such time as he repudiated his further liabilities—provided of course that he was in the first instance capable of expressing his consent to take the shares.

It is intended now to analyse certain cases as a result of which, it is hoped, it will become clear that the courts have not always denied the validity of appointments by infants of agents or of the contracts made by their agents with third parties.

Cases where an Infant Principal has appointed an Agent and the Court has considered the Contract between Them

In *Mackinlay* v. *Bathurst*,[14] the plaintiff, a singing teacher agreed in October, 1914, with the (then) eighteen-year-old defendant and her father to train her voice for three years at 100 guineas per annum. Since the father could not afford to pay such a fee, the contract provided that, during tuition and for seven years after, the plaintiff was to be the defendant's business manager, to receive one-third of her gross income until the fees were fully paid, to carry out all negotiations for engagements to sing, and during tuition and seven years after to receive commission in certain events at certain rates. To use the words of Warrington L.J.[15] "The plaintiff had made Mrs. Bathurst a success as a professional singer," since, by November, 1917, the tuition fees had been paid to the plaintiff in the form of commission. The defendant had not repudiated the contract when she came of age in May, 1917, but in the following year she married and refused to pay the plaintiff any further commission on the ground that she was working for her husband without payment. The question arose whether the defendant's contract was "beneficial." No objection was taken at all to the plaintiff's being an agent, indeed Warrington L.J. thought that[16] "there could be no question but that the agreement was for her benefit," and pointed out that the plaintiff, by his appointment as business manager, "thereby accepted the obligation of conducting her business engagements as efficiently as might be, for the principal's benefit."[17]

[14] (1919) 36 T.L.R. 31.
[15] At p. 32.
[16] *Ibid.*
[17] *Ibid.*

Moreover, he remarked later [18] that the plaintiff "had as her business manager to advise her and negotiate the contract offered to her." Atkin L.J. and Eve J. also were both satisfied that the contract was for the infant's benefit.[19] The court accordingly ordered an account to be taken of the commission due to the plaintiff. Another case is *Shears* v. *Mendeloff*,[20] where, although the contract between the infant and the agent was held not to be binding, neither judge nor counsel took the point that the infant had appointed an agent. Shears, a manager for professional boxers, sued the infant, known as "Kid Lewis," and his father for breach of an agreement whereby Shears was to be sole manager for Kid Lewis. The latter was bound not to take engagements under any other management without the consent of Shears (who was to have 25 per cent. commission on what Kid Lewis earned) for a period of three years. Avory J. held that "there was no obligation on the part of the plaintiff to find engagements, whereas the infant was debarred from taking any engagements without the plaintiff's consent . . . the agreement was nothing more than an appointment of the plaintiff as the defendant's agent on commission, and came under the heading of trading contracts and therefore was not enforceable against an infant. It was not a contract for necessaries at all. The agreement on the face of it could not be construed as beneficial to the infant. . ." [21] These words imply that had he been able to find that the contract was "beneficial" or for necessaries, the judge would have enforced the contract. It is unfortunate that the report of *Lofthouse* v. *Brown* [22] is so short that it is difficult to discover exactly the facts on which the court proceeded,[23] for it might have proved interesting. The American case of *Casey* v. *Kastel* [24] shows that an infant of years of discretion may appoint an agent. There an infant sued to recover in respect of the conversion of certain shares held by her in the United States Steel Corporation. The certificates for these were in the hands of the defendant, her broker, who had sold them without her authority. The plaintiff ratified the defendant's act, but later disaffirmed and joined the broker and the Steel Corporation, who had cancelled her share certificate at the purchaser's request. Pound J. cited, *inter alia*, Williston, Vol. I, page 444, to the effect that "there seems no reason except the antiquity of the rulings to that effect which can support the broad proposition that an infant's

[18] At p. 33.
[19] Their succinct judgments appear on p. 33.
[20] (1914) 30 T.L.R. 342. See too, *Huntman* v. *Barton*, *The Times*, April 2, 1955.
[21] At p. 342–3, *passim*.
[22] [1898] W.N. 52.
[23] It is simply stated that "an infant who earned her living by performing at music halls employed a theatrical agent to procure her engagements on commission. The agent procured her engagements and the infant had the benefit of them. In an action by the agent for commission *held*, infancy was a defence."
[24] 237 N.Y. 305 (1924).

. . . appointment of an agent is void: and, generally, in recent cases courts have been disposed to treat the creation of an agency by an infant, like other agreements made by him, as merely voidable. A ratification by an infant of an act done on his behalf, but without his authority, stands logically on the same ground as an act originally authorised by an infant principal, and has been held binding." Before deciding the appeal in favour of the Corporation, the judge added somewhat forcefully his own words, "sound principles compel the conclusion that no satisfactory distinction can be drawn between a sale and delivery by the infant and sale and delivery by an agent for him. The sale of the stock by Kastel was voidable only and not void. Dicta and general statements to the contrary are no longer respectable authority."

We may now turn to:—

CASES WHERE AN INFANT PRINCIPAL HAS APPOINTED AN AGENT AND THE COURT HAS CONSIDERED THE TRANSACTION EFFECTED BY HIM WITH THE THIRD PARTY.

The Canadian case *Johannson* v. *Gudmundson*[25] provides an excellent example. The plaintiffs were two brothers, suing by their next friend for damages for breach of an agreement for the sale of a piece of land. The agreement was properly evidenced by a written receipt for a deposit of fifty dollars. The brothers had, as the defendant admitted at the trial, duly authorised their father to act as their agent in making the purchase. Howell C.J.A. stated that[26]: "According to my view of the common law, the appointment is void or voidable just like any other act, undertaking or contract of the infant. If the appointment is to the disadvantage of an infant, as a warranty of attorney, it is absolutely void. If an agent is appointed to execute a bond with a penalty the appointment would be void. An infant can appoint an agent to purchase necessaries, to dispossess a trespasser, to receive livery of seisin, to repudiate a contract, to elect on a contract and for many other purposes." Perdue J.A. was not clear to whom the purchase-money belonged, but assumed it was that of the plaintiffs and not the father's. The latter, he said, was "a mere messenger to communicate with the defendant on behalf of the plaintiffs."[27] Cameron J.A. was more specific[28]: "The two contracts involved, one of agency to purchase, and the other of purchase, which must be considered together, were, and are, obviously for the benefit of the infant plaintiffs." The court awarded 250 dollars damages to the plaintiffs. It may surprise some that the well-known case of *Doyle* v. *White City Stadium Ltd.*[29] should afford an illustration

[25] *Supra.*
[26] At pp. 88–9.
[27] At p. 91.
[28] At p. 96.
[29] [1935] 1 K.B. 110; (1934) 152 L.T. 32.

of this point. Without fully going into facts which are well remembered, it is worth noting that MacKinnon J. at first instance experienced difficulty in deciding with whom it was that Jack Doyle had actually contracted to fight Jack Petersen. The learned judge said,[30] "I am quite satisfied that the truth is that the contract really was made between Dan Sullivan,[31] *as the authorised agent of the plaintiff*,[32] and Jeff Dickson.[33] Indeed the learned judge had described Mr. Sullivan as follows[34]: "The plaintiff certainly at all material times had a man named Dan Sullivan as his appointed agent and manager." Neither MacKinnon J. nor the Court of Appeal cavilled at Mr. Sullivan's position as agent. Yet, surely, if the law is as Denning L.J. has stated it to be, Mr. Sullivan had no authority to make any contract on Jack Doyle's behalf. Strangely enough, the agency point was not taken in *Murray* v. *Harringay Arena Ltd.*[35] There, a boy six years of age was taken by his father to see an ice-hockey match in the defendant's arena. The boy was injured when the puck struck his head. In the course of holding the defendants not liable in damages, Singleton L.J. said,[36] "I assume that the infant plaintiff is to be regarded as having entered into a contract with the defendants." It is not possible to discover from the facts quoted the exact circumstances in which the father took the boy to the match, but, if the father bought tickets for both of them, he must have acted as agent or intermediary of some kind on behalf of the boy. It is certain that he brought about a legal relationship between the plaintiff and the defendants—at least in the mind of Singleton L.J. Nothing was said by him or by the counsel as to the type of agency created as between the plaintiff and his father. It would have been expressly created, presumably, had the plaintiff asked his father to take him; on the other hand, the case may furnish an example of some new kind of agency of necessity or agency by relationship. The more tenable suggestion is that a parent or other person *in loco parentis* has authority implied by law to make contracts which are not unreasonable[37] on behalf of his own children committed to his care, *e.g.*, to purchase a cinema ticket when the child is taken to the cinema simply because there is no one to sit with it at home, or a bus or train ticket taken with a view to going to a race-meeting which the parent would have to forgo altogether if he did not take the child with him. None of these are contracts for necessaries

[30] (1934) 152 L.T. at p. 34.
[31] Mr. Sullivan was Jack Doyle's manager.
[32] Italics supplied.
[33] Mr. Dickson was the head of the company promoting the Doyle-Petersen fight.
[34] *Ibid.*
[35] [1951] 2 K.B. 529.
[36] At p. 533.
[37] It is difficult to see how one could describe this contract as one for necessaries or as being within the class of "beneficial" contracts. See C. A. Wright, *Cases on the Law of Torts*, p. 437.

quoad the child. Indeed the view might be advanced that a parent or person *in loco parentis* has authority to make such contracts which is to be presumed from the fact that he is the child's parent or is otherwise properly in charge of it and thus able to decide what is good for it.[38] It is probably wiser to regard the father in this case as having authority implied by the law rather than a presumed authority, since the latter must necessarily rest upon the child's having consented to the agency, whereas the former does not.[39] Singleton L.J. did not consider whether the contract was one for necessaries or a "beneficial contract." He simply said,[40] "I regard it as clear that the implied term is not that the occupiers shall guard against every known risk. There are some which every reasonable spectator foresees and of which he takes the risk. It may strike one as a little hard that this should apply in the case of a six-year-old boy, but in considering liability under an implied term in this contract, it would not be right to introduce a wider term because one of the parties is a youth."

A further difficulty arises in connection with partnerships in which some one or more of the partners is an infant. It is true that the statutory definition of a partnership does not itself import an agency.[41] But the Act later states,[42] "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners . . . ." The Act does not specifically state that an infant can or cannot be a partner, although there is nothing in its text to lead one to suppose that he cannot. But it is clear that once an infant does enter into a partnership agreement he thereby appoints the other partners as his agents. While they would not have authority to bind him by trading contracts, they would, presumably, bind him whenever they made a contract for the supply of goods to the firm which were, *quoad* him, necessaries, *e.g.*, furniture, account books,

[38] *Cf.* the authority implied by law in certain circumstances in favour of a wife who is living apart from her husband to bind him by her contracts for necessaries, and the wife's authority presumed from the fact that she is living with her husband in a domestic establishment of their own to pledge his credit in certain circumstances and generally to act as his agent in the management of the household.

[39] *Qu.* what would be the position if the plaintiff in this case had been taken to the match—not by a parent or person *in loco parentis*—but by some other person who, without authority other than that given him by the plaintiff, bought the infant's ticket for him? A similar circumstance would arise where a child under 16 asks a stranger to buy his ticket for him and take him into a cinema where an "X" film is being shown. Is the child (who looks to be over the age of 16) a trespasser, licensee, invitee or one who can rely on the rule in *Francis* v. *Cockrell* once he is inside the cinema? Would the result differ if the film were an "A" film only?

[40] At p. 536.

[41] "Partnership is the relation which subsists between persons carrying on a business in common with a view to profit." (Partnership Act, 1890, s. 1 (1).)

[42] See s. 5.

etc., for the office, or a " beneficial " contract, such as the taking on of a clerk at a salary. But, if an infant really may not appoint an agent it is difficult to see what is his relationship towards both third persons and his partners. It would seem that he occupies the position of some sort of " quasi-partner " or " limited partner," yet in *Lovell & Christmas* v. *Beauchamp* [43] Lord Herschell L.C. says, " I think it is clear that there is nothing to prevent an infant trading, or becoming a partner with a trader, and that until his contract of partnership is disaffirmed he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm he does not become a debtor in respect of them." [44] A further case implying that an infant may be a partner and that he may appoint an agent is *Re a Debtor, ex p. Commissioners of Customs & Excise*.[45] The question at issue was whether a receiving order could be made in respect of unpaid purchase tax against an infant as well as her mother, with whom she had been carrying on business in partnership. This tax was described by the Finance Act (No. 2), 1940, s. 31 (2), as being " recoverable as a debt due to His Majesty from the person accountable therefor." The Court of Appeal unanimously held that these words meant that the liability to pay the tax was a debt legally enforceable against the debtor, notwithstanding that she was an infant, and that a receiving order should be made against her. Do not both these cases permit us to say that, since the adult partners as the infant partner's agents may make such contracts for the purposes of the partnership as would bind the infant had he made them himself, then, (i) any infant who has the capacity to affect his legal relationship by the giving of consent may authorise an agent to act for him, and (ii) that the acts of the agent will have the same legal effect on the infant as if he had done them himself? In *Whitney* v. *Dutch* [46] Parker C.J. held the defendant Green, who had been in partnership with the defendant Dutch, liable on a promissory note. Dutch had defaulted and Green was under age at the date when Dutch had made the note in the form and style of " Dutch & Green." When Green came of age the plaintiff applied to him for payment of the note. Green

[43] [1894] A.C. 607 at p. 611. *Qu.* might it be fairer to such persons as the appellants if partnerships in which some of the partners were infants were compelled to be registered under the Registration of Business Names Act, 1916, and the ages of the infant members to be specified in the register? See, too, *Hawkins & Sunderland* v. *Duche & Sons* (1921) 90 L.J.K.B. 913 at p. 916, *per* McCardie J.

[44] The case decides that where there is an infant partner in a firm, a receiving order cannot be made against the firm in respect of a trading debt, because it is a debt upon which an infant cannot be made liable. Instead the order must be made against the " defendants (*i.e.*, adult partners) other than " the infant partner.

[45] [1950] Ch. 282.

[46] *Supra*.

thereupon promised to try to get the money. Had Denning L.J. been seized of a similar case, he would have been able to hold the defendant Green not liable on the ground that he could never have validly appointed Dutch as his agent, and that he accordingly could not be bound by the note.[47] For a case where the agent does not make a contract for his infant principal, *Ewer* v. *Jones*[48] will serve. The defendant was the duly accredited general agent and receiver of one Louisa Pennant, and infant and ward in Chancery. We are not told whether he was appointed by her; nor whether there was an agency contract—Dr. Powell appears to think not.[49] He had ejected the plaintiff from freehold land then belonging to Louisa Pennant, but which had been let to the plaintiff by the former owner of the reversion. The jury having inferred that his general authority enabled him to eject trespassers, it was held that he could set up this authority in his defence. Coleridge J. said "Nothing appears to show that the act was such as she could not command on her own land."[50] Indeed, there was nowhere any suggestion that Louisa Pennant could not appoint an agent, nor that she was not bound by what the defendant Jones had done.

Let us assume for the sake of argument that Lord Justice Denning's ruling is correct for all purposes. We shall see that a great many inconvenient results will follow. One such result has been pointed out by Mr. Megarry.[51] He says "Many agency concerns exist primarily to carry through transactions more conveniently and on better terms than their principals could achieve; yet an infant, it seems, must either shun their services or else resort to the inconvenient artificiality of acting throughout on their advice but effecting himself all the vital dealings." Surely, if the infant "shuns" the agents who would otherwise be available to him, he is "all too likely" to make a contract which is not "beneficial" to him—not because he has not sufficient discretion, but because he has not that knowledge which the expert agent has. If, on the other hand, the infant were to "effect himself all the vital dealings" while resting on the advice of such "agent," we may justifiably ask what is the status of the "agent." Is he a servant, or perhaps, an independent contractor, who runs a grave risk of losing his remuneration when the courts hold that the

[47] This raises the point whether an infant could ever be held liable under s. 14 (1) of the Partnership Act, 1890, as a result of holding himself out or of suffering himself to be held out as a partner. *Qu.* would he be held liable on facts similar to *Ryan* v. *Sams* (1848) 12 Q.B. 460? It is submitted not, if only by analogy with the fact that an infant cannot give his consent to his goods being in the "reputed ownership" of a bankrupt within the meaning of s. 38 (c) of the Bankruptcy Act, 1914; and see *Re Mill's Trusts* [1895] 2 Ch. 564.

[48] (1846) 9 Q.B. 1412.

[49] *Op. cit.*, p. 242; footnote 9.

[50] At p. 1413.

[51] 69 L.Q.R. at p. 447.

contract under which he is employed is a mere trading contract and so not binding on the infant? A further difficulty engendered of the Lord Justice's ruling is that every third party, upon discovering that the agent is acting for an infant principal, may sue the agent for breach of warranty of authority and/or have the contract declared void—although had the infant made it himself he would clearly have been bound.[52] The repercussions on an infant could be very great—especially since he cannot sue the third party. Moreover, the third party could back out with impunity if he felt like doing so. Yet more, if an infant cannot appoint an agent even to purchase necessaries, it will now be incumbent upon every wise shopkeeper tactfully to inquire of each lady customer who seeks credit from him whether or not she is married, and, if so, if she is living with her husband and again, if so, whether he is under twenty-one. Clearly the tradesman must, in order to safeguard himself, explain to the wife of a happily-married minor that he has the alternative either of supplying the husband personally or insisting on cash down (or that the wife must pledge her own credit). If he did not take this precaution and act accordingly on the answer given, it would appear that he could not look to the husband for payment.[53] Indeed it were a strange thing if a tradesman could sue the wife of an infant husband for breach of warranty of authority every time she properly (in the light of the supposed law) pledged her husband's credit, and also for conversion or detinue of the goods supplied. Conversely, of course, the wife could insist that she was entitled to return the goods and have her money back.

Conclusions

It is submitted that the following propositions represent the probable state of the law.

1. Where an infant appoints an agent under a contract, the contract will be fully effective and the agent can recover the contractual remuneration if the agency contract can be regarded in all the circumstances as for the infant's benefit. It may be that

[52] *e.g.*, an agent who purchased necessaries for the infant would seem to be in danger of falling into this predicament unless the courts were willing to hold that s. 2 of the Sale of Goods Act, 1893, being worded impersonally, covered purchases of necessaries both by infants personally and by agents for infants. *Qu.* does the section extend to purchases of necessaries on behalf of an infant by, *e.g.*, its mother, *apart from* her implied authority or presumed authority already referred to? The problem might arise in connection with a (potentially) rich child of impecunious parents.

[53] This raises the question whether an infant husband could be made liable on his wife's authority implied by law to pledge his credit for necessaries, *e.g.*, when he has turned her out unprovided for and without sufficient cause. Morally, at least, he should be liable. Moreover, there is no reason to suppose that s. 21 (1) (b) of the Matrimonial Causes Act, 1950, does not apply to an infant. Nor, it is submitted, is there any adequate reason why *Sandilands* v. *Carus* [1945] 1 All E.R. 374 should not apply to an infant.

such a contract can only be regarded as beneficial if the transaction which the agent is employed to effect on the infant's behalf is:—

(a) a contract "beneficial" to the infant,[54]

(b) for the purchase of necessaries, or [55]

(c) a contract enforceable against the infant unless repudiated by him on attaining majority (*e.g.*, for the acquisition of shares).

In this connection, it is suggested that the rules as to a wife's authority in the appropriate circumstances to pledge her husband's credit apply equally to husbands under age as to adult husbands.

2. Where an agent appointed by an infant (whether or not by a contract) enters into a contract with a third party, or does some other act affecting the third party, in accordance with his authority, and that contract or act is for the infant's benefit or is something which the infant was himself legally entitled to do, the infant may recover damages (but not, of course, obtain a decree of specific performance) from the third party.[56]

Conversely, the agent can set up the infant's authority in his own defence if he is sued by the third party.[57]

Similarly, the third party can recover damages from the infant principal or otherwise enforce the terms of the contract effected by the agent on behalf of the infant principal (but not, of course, by means of an action for specific performance).[58]

3. A parent or person *in loco parentis* may perhaps bind an infant who is properly under his charge by certain contracts, although they are not contracts which the infant could have validly made himself. It would appear that, in this case only, it is immaterial that the infant has not reached years of discretion.[59]

4. Where an infant is a partner in a firm, section 5 of the Partnership Act applies, as regards him, only to the limited extent that his partners may bind him and the firm as a whole by such acts and contracts as the infant partner could have himself done or entered into.[60]

5. In so far as an agent appointed by an infant principal does some act on behalf of his principal which is not for the principal's benefit or is otherwise such that the principal would not have been bound by it if he had acted personally, the agent will have to that extent exceeded his authority and the infant will not be bound. In this connection the contract under which the agent was appointed

[54] *Mackinlay* v. *Bathurst* and *cf. Shears* v. *Mendeloff*, both *supra*.
[55] Sale of Goods Act, 1893, s. 2, and see footnote 52, *supra*.
[56] *Johannson* v. *Gudmundson*, *supra*.
[57] *Ewer* v. *Jones*, *supra*.
[58] *Doyle* v. *White City Stadium Ltd.*, *supra*.
[59] *Murray* v. *Harringay Arena Ltd.*, *supra*.
[60] *Lovell & Christmas* v. *Beauchamp*, *Re a Debtor*, *Whitney* v. *Dutch*, all *supra*.

or the circumstances attending such appointment if there is no contract, ought to be considered together with the contract or other act of the agent entered into or done by him with the third party.[61]

6. Subject to the foregoing, the agency contract will be void as against the infant by virtue of section 2 of the Infants' Relief Act, 1874.

P. R. H. WEBB.*

[61] *Johannson* v. *Gudmundson*, but *cf. Lofthouse* v. *Brown*, *Sheppard* v. *Cartwright*, *Zouch* v. *Parsons*, *Doe* d. *Thomas* v. *Roberts*, *Whitney* v. *Dutch*, all *supra*.

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STATE ARBITRATION IN THE U.S.S.R.

("GOSARBITRAGE")

IF the National Coal Board were to fall out with the British Electricity Authority about the performance of a contract for the supply of coal, no doubt the dispute would in practice often be referred to private arbitration; but the ultimate method of determining and enforcing the contractual rights of our nationalised concerns is still litigation, with its uncertainty, expense and delay.

If the National Coal Board could not agree with the British Electricity Authority on the terms of a proposed new contract, for example, on the price to be paid for coal, there is no method known to our law for compelling the parties to enter into contractual relations, and victory would presumably go to the most obstinate.

In the U.S.S.R., where the whole of industrial production is elaborately planned, and where any default in supply might cause a chain of breakdowns, and even delay in entering into contracts envisaged by the Plan might have serious repercussions, it was essential to evolve a speedy and efficient system of solving disputes between commercial concerns if plans were not to be dislocated.

This has been achieved by Gosarbitrage (a portmanteau word meaning "State arbitration"). Gosarbitrage was established in 1931. Originally responsible to the Council of Ministers, it has since last year come under the Ministry of Justice. There is a U.S.S.R. office in Moscow, offices for each of the sixteen republics, and subordinate regional offices as requisite. Each office consists of a chief arbitrator, his deputy, and a number of arbitrators. High qualifications are required for the post, a thorough grounding in law, finance and economics being insisted on.

Gosarbitrage deals with disputes between organisations belonging to different Ministries: as there are seventy-three Ministries, and as pretty well every institution in the country comes under one or another of them, there is plenty of scope for its work. Where both parties are subordinate to the same Ministry, there is a system of arbitration within the Ministry concerned. International arbitration involving foreign firms is dealt with by the All-Union Chamber of Commerce and the Ministry of Foreign Trade.

Gosarbitrage settles disputes arising from breaches of contract, non-contractual obligations (*e.g.*, the valuation of property which is being transferred from one Ministry to another), torts causing damage, and money had and received; but that by no means exhausts its functions. Within two years of its establishment, it was given power to arbitrate on the terms to be inserted in *proposed*

contracts to be made between two concerns in performance of the State plan (these are known as "pre-contract disputes"); and in 1939 it was given the further duty of settling Standard Conditions of Contract to apply to all contracts for the supply of a given commodity, where the producing and consuming Ministries concerned could not agree.

The jurisdiction of the courts is ousted, and Gosarbitrage has exclusive compulsory jurisdiction in the case of all disputes arising between trading corporations, factories and similar institutions, with the following exceptions:—

(1) Disputes between concerns, whose transactions are a charge on State or local funds, both administered by the same Ministry. Here, as has been said, there is an internal system of arbitration.

(2) Disputes between other concerns belonging to the same authority, economic association or co-operative system, without the consent of their head office.

(3) Disputes concerning normal banking operations of the State Bank, to which the State Bank is a party. This exception does not apply to other banks, nor to disputes arising out of non-banking operations, *e.g.*, the building of new premises for the State Bank.

(4) Disputes arising out of contracts for the carriage of goods by rail (except contracts for the exploitation of private branch railways).

(5) Disputes arising out of contracts for the carriage of goods by sea or river.

The last two exceptions do not apply to pre-contract disputes on these subjects, which do go to Gosarbitrage.

(6) Disputes over taxes and other debts, *e.g.*, sewage discharge rates, recoverable summarily, which the debtor can contest only by administrative procedure. There is a further class of summary debts where administrative procedure does not apply: examples are demurrage on railway wagons, return of empty sacks, hire of wireless relay stations. Here the debtor can apply to Gosarbitrage to set aside the summary writ of execution, or, if execution has already taken place, for the return of the property seized or its value.

(7) Disputes over contracts for the supply of municipal services, such as gas, water, and electricity. The Supreme Court has construed this exception strictly: it applies only to the domestic consumption of such services (*e.g.*, in a canteen), not to their industrial use.

(8) Disputes to which a collective farm is a party.

(9) Disputes to which a private citizen is a party.

(10) Disputes where the sum involved is less than 1,000 roubles.

The last three are all dealt with by the courts.

In carrying out its duties Gosarbitrage is expected to display considerable initiative.

Every year, before the annual plan comes into operation, the head office of Gosarbitrage sends instructions to all its branches on the steps to be taken to ensure the timely conclusion of contracts and to deal with pre-contract disputes, and draws attention to weaknesses experienced in the past year. It organises conferences for officials whose duty it is to make contracts, and gives them advice. It checks up on the progress made in entering into contracts, draws attention to any delays, and where there has been undue delay, takes the initiative in summoning the parties to arbitration.

The practical experience gained by Gosarbitrage is turned to account in formulating Standard Conditions of Contract, which are deemed to be incorporated in all contracts for the supply of a given article, and in proposing amendments and additions to these Conditions from time to time.

Gosarbitrage makes suggestions to the Government on directives which it thinks desirable. Recently there have been directives: (1) on when it is appropriate to stipulate for more frequent deliveries than once a month (stipulations which Gosarbitrage found were often being made inappropriately and were causing much trouble), and (2) on the necessity for the consumer making known to the supplier his requirements as to assortment in good time.

Pre-Contract Disputes

Where two concerns cannot agree on the terms of a proposed contract, they must record their disagreement in a memorandum setting forth the point at issue and the contentions of each party, which must be signed by the director of each concern. One party —or both—may then claim arbitration. Gosarbitrage must within twenty-four hours fix a time and place for the hearing, which takes place in four days, if both parties are situate in the same town, or four days plus the necessary travelling time, if one party comes from elsewhere.

The Standard Conditions of Contract often provide that it is the supplier's duty to refer a pre-contract dispute to arbitration, and that if he fails to do so within (say) ten days, he will be deemed to have accepted the consumer's terms as recorded in the memorandum of disagreement. If the supplier seeks to refer to arbitration after the expiration of such a time limit, the arbitrator will entertain the claim only if there is valid reason for the delay; otherwise he will apply the Standard Conditions and dismiss the claim.

Some local industries, craftsmen's co-operatives and disabled men's co-operatives, are free to decide what they will manufacture, and Gosarbitrage will not compel them to enter into contracts to supply such goods to any particular customer. It will entertain

pre-contract disputes in the case of such goods only by consent, and only where the principal terms of the proposed contract (quality and quantity of goods, price, and periods of delivery) have been agreed, and all that remains to be settled is some minor term (*e.g.*, exact date of delivery, or precise assortment of each consignment). But pre-contract disputes relating to goods which these organisations are bound by law or by plan to manufacture go to arbitration in the usual way.

In dealing with a pre-contract dispute, the arbitrator will not only deal with the disputed term, but look at the whole contract, and he is not confined to considering propositions made by the parties. He will of his own motion correct any illegality or ambiguity in the proposed terms, and add any essential term which has been omitted, whether or not the parties wish him to do so. He is guided not only by the interests of the parties before him, but by the general interests of the community.

He will consider whether the parties to the proposed contract are the best ones, and whether the substitution of an organisation's headquarters or local branch might not save transport or storage costs.

If the contract proposals seek to change what is in the State plan, the arbitrator will authorise such a change only after careful consideration of the supplier's productive capacity and the availability of alternative sources of supply.

It is now the policy to insist on terms providing for the maximum assortment of articles of mass consumption; and so to arrange intervals of deliveries as to ensure steady working of factories throughout the year.

Where one concern cannot induce another to contract with it at all, it may apply to Gosarbitrage for a ruling that the plan or some law or decree requires a contract to be made.

Sometimes the plan provides for the supply of a commodity by one concern to another, but neither party makes any move to contract with the other. Here Gosarbitrage steps in and imposes a contract on them, and orders one party or the other to pay any penalty prescribed by the Standard Conditions for delay in entering into a contract.

Breach of Contract

Contracts are regarded in the Soviet Union as imposing solemn obligations, the breach of which is a serious matter. This attitude is well illustrated by some of the features of arbitration practice.

The arbitrator must normally insist on the enforcement of the penalties provided for in the contract for its breach, even if the claimant desires to waive them in whole or in part. If the claimant has not claimed the contractual penalty, the arbitrator must award it of his own motion. Only in rare cases does the law permit the arbitrator to sanction any waiver.

If after an account has been taken between the parties, the claimant desires to reduce his claim, or if a claimant desires to reduce a claim for unliquidated damages, the arbitrator will require details in writing signed by the director, and will sanction this course only for good grounds.

The reason for this strictness is that otherwise two concerns in close trading relations might feel tempted to overlook each other's shortcomings in the hope of future leniency towards their own, to the detriment of the plan.

Soviet authorities take a serious view of the production of shoddy goods, which is a criminal offence. Where an arbitrator discovers that this has taken place, he will report the offender to the authorities for prosecution. He will also award damages to the consumer, whether or not the shoddy goods are below the standards specified in the contract. In other words, an implied term is read into every contract, in spite of agreement to the contrary, that goods shall be of high quality. Even where no contractual relations exist (*e.g.*, the unsolicited tender of goods on approval) the supplier will be penalised, although here of course the penalty will not go to the intended consumer; it goes to the State.

If defective goods are delivered, the consumer must at once follow the prescribed procedure for certifying their condition and lodging a claim against the supplier. If he fails to do so, but the arbitrator is otherwise satisfied that the supplier is responsible for the defects, the supplier will be ordered to pay the full contractual penalty, but the arbitrator may order up to three-quarters of it to be paid to the State and not to the consumer. Of course if the consumer's failure prevents liability for the defect being fastened on the supplier, he will lose his claim.

Where a supplier is in arrears with delivery instalments, any penalties provided for late delivery are regarded as cumulative, unless a belated consignment is rejected altogether. In other words, a supplier cannot claim that a consignment should be regarded as fulfilment of his current obligation so long as there are any arrears to be made up.

All concerns guilty of breach of contract are automatically reported by Gosarbitrage to their Ministry or head office.

Variation or Revocation of Contract

It follows from the high respect paid to contractual relations in the Soviet Union that it is not easy to vary or revoke a contract once it has been signed. The general rule is that if both parties are subordinate to the same Ministry, its consent is required; if they are not, and one of them is of all-Union status, the consent of no less a body than the Council of Ministers is required; and if they are both of republican or regional status, there is a special procedure laid down in legislation.

An arbitrator can vary or revoke a contract *only* if it conflicts with State plans or government decrees. Such excuses as shortage of raw materials or labour, insufficient productive capacity, a change in public taste, or the unprofitability of the contract are not regarded as grounds for relieving a party from his contractual obligations.

Jurisdiction

Whether a regional or republican office of Gosarbitrage or the U.S.S.R. headquarters has jurisdiction in an individual case depends on the status of the parties and the amount in dispute.

The U.S.S.R. office deals with—

(1) Disputes over the terms of Standard Conditions of Contract, where one party is an all-Union Ministry, or the parties are republican Ministries from different republics.

(2) Pre-contract disputes involving 5,000,000 roubles or more, and money claims for 50,000 roubles or more where one party is an all-Union Ministry, or the parties are republican Ministries from different republics.

(3) Pre-contract disputes and money claims arising out of the exploitation of private branch railways, irrespective of amount.

(4) Other cases by special decree of the Government.

The republican office deals with—

(1) Disputes over the terms of Standard Conditions of Contract between Ministries of the same republic.

(2) Pre-contract disputes involving 1,000,000 roubles or more, and money claims for 25,000 roubles or more, where one party is of republican status or both parties come from different regions.

(3) Pre-contract disputes of 1,000,000 to 5,000,000 roubles and money claims of 25,000 to 50,000 roubles, where one party is of all-Union status, or both parties are of republican status from different republics.

Regional offices deal with all other pre-contract disputes, and all money claims of not less than 1,000 roubles arising between parties belonging to different Ministries. It will be seen that in small matters a regional office may determine the rights even of so important a body as an all-Union Ministry, while on the other hand where a dispute is purely local, the regional office will handle it irrespective of magnitude.

There are special offices for the cities of Moscow, Leningrad and Kuibyshev, which have a somewhat extended jurisdiction.

The region or republic where the arbitration takes place is that of the respondent in money claims, and of the supplier in pre-contract disputes. Where the quality of goods delivered is in dispute, the arbitration will be held at the place of delivery, or if they have been rejected, where they actually are.

An office which has prima facie jurisdiction can decline to act only if the arbitrator considers that some authority of a higher status, or situate outside the area of his juridiction, ought to be a party to the proceedings. In such a case he refers it to the office above him.

Disputes concerning living accommodation are dealt with by Gosarbitrage only to the extent that it will determine which of two concerns is entitled to the building in question; it will not order the eviction of a sitting tenant, which is a matter for the court.

Proceedings

Proceedings may be initiated by either of the parties, their head offices or Ministries, the Ministry of Justice, or Gosarbitrage itself, which will act if it possesses written information on the existence of a breach of contract.

Before going to arbitration the claimant is bound to take steps to settle the dispute directly. Proof that he has done so must be annexed to his points of claim. In money claims, this consists of a letter before proceedings; in pre-contract disputes, of the memorandum of disagreement. If this proof is not forthcoming, the claim will be rejected.

To avoid Gosarbitrage being used as a debt-collecting agency, a claim for money due for goods supplied or work done is accepted only on proof that the debtor has been invited to draw on his bank for the sum due and has declined to do so, or that his bank has declined for a period of thirty days to honour his draft. Where the debtor has drawn on his bank, it is idle to go to arbitration, since a draft has the force of a writ of execution and obliges the bank to transfer the sum named from the debtor's account to the creditor's.

The points of claim (or counterclaim) must be signed by the director or his deputy. If they are defective, they may be returned unconsidered, or the claimant given a time-limit in which to amend them. If he fails to do so, they will then be returned unconsidered.

The statutes of limitation are applied in arbitration. If grounds are alleged to exist which extend the period, this point will be dealt with at the hearing. If no such contention is raised, and the claim is clearly statute-barred, it will be summarily rejected.

A claim that the respondent be ordered to contract with the claimant must contain:—

(a) proof of the alleged duty to contract;

(b) proof of efforts to induce the respondent to contract; and

(c) a draft contract, if by the Standard Conditions of Contract the duty to submit a draft is on the claimant, otherwise a description of the subject-matter of the contract; and

(d) proof of payment of the State fee, and of service on the respondent of a copy of the points of claim and annexed documents.

There is no third-party procedure in Gosarbitrage: if the respondent claims that his default was occasioned by a third party he must bring his own independent proceedings, and there will normally be no stay of execution against him meanwhile.

Fees

The fee payable for an arbitration, which goes to the Exchequer, is as follows—

(1) Breach of contract disputes: 2 per cent. of the sum claimed; or if not a money claim, 20 roubles.

(2) Pre-contract disputes: 100 roubles in regional, 300 roubles in republican, and 500 roubles in all-Union arbitrations.

On appeal to the Chief Arbitrator:—Half the first fee, calculated on the amount remaining in dispute.

The claimant (or appellant) pays the fee in the first instance, and recovers it from his opponent if successful.

Representation

The arbitration tribunal consists of an arbitrator and a responsible representative of each party. If the representatives cannot agree upon an award, the arbitrator makes his sole award.

In breach of contract disputes, directors or their deputies, authorised representatives of the Ministry, and heads of sections or shops whose work is in issue, if authorised by the director, are considered responsible representatives. In pre-contract disputes, where an award may establish liabilities of long duration, the field is narrower. Only the director or his deputy, or the chief of department of a Ministry or his deputy, may act as responsible representative.

Representatives are not supposed to let the case go by default. In an all-Union arbitration, where important issues may be at stake, the case cannot proceed in the absence of either party without the sanction of the Chief Arbitrator himself. In the lower arbitrations, the arbitrator has a discretion to proceed, but does so only exceptionally.

Other representatives of either party may be present at the hearing, *e.g.*, engineers, economists, lawyers, accountants, and they may give evidence and produce documents; but they cannot replace the director or his deputy.

Any non-appearance is reported to the appropriate Ministry.

Speed of Hearing

The U.S.S.R. office has a rule to hear all Moscow disputes in fifteen days, and all other cases within one month. The latest

figures show that 60–70 per cent. of cases are dealt with in fifteen days, and 95 per cent. within a month. The list is arranged to ensure the minimum waste of time by busy directors. The length of hearing is estimated, and times for hearing each case appointed throughout the day. If one concern has several pending arbitrations, they will all be put in the list for the same day.

Appeals

An appeal lies as of right to the Chief Arbitrator of the office where the case was heard. In pre-contract disputes he must determine the appeal within four days (if both parties are situate in the same town) or four days plus any necessary travelling time (if they are not). In breach of contract cases the period is one month, which may be extended if there is a lengthy investigation or examination of accounts to be undertaken.

If the Chief Arbitrator dismisses the appeal in whole or in part, he must submit his decision with reasons to his superior office for approval.

Apart from appeal by the parties, all awards are kept under constant review both by the Chief Arbitrator and the Ministry of Justice, who have wide powers to correct any illegality in an award or in appropriate cases to order a new hearing.

An appeal does not operate as a stay of execution unless the Chief Arbitrator so directs.

Execution

Awards are subject to immediate execution unless otherwise stated. In this they differ from judgments, which may be executed only after the time limit for giving notice of appeal has expired, or the appeal dismissed.

Gosarbitrage must serve a copy of the award on the parties within forty-eight hours; in practice it does so within twenty-four hours simultaneously with the writ of execution.

Failure by an official to comply voluntarily with the terms of an award may render him liable to prosecution.

Pre-contract awards are subject to execution only as to the arbitration fee and as to any penalty for delay in making a contract. The contract awarded is deemed for all purposes to be in existence, and the parties are estopped from denying it in any subsequent proceedings.

Payment of sums of more than 500 roubles is enforced by addressing the writ of execution direct to the debtor's bank, which is then bound to transfer funds from the debtor's account to the creditor's. If there are insufficient funds, the writ is handed to the court bailiff for execution in the ordinary way. Sums up to 500 roubles are levied in the first instance by the court bailiff.

Sums of more than 200,000 roubles due from an all-Union institution, 50,000 from a republican institution, and 10,000 from a regional institution, are recoverable respectively from the U.S.S.R. Treasury, the republican Treasury, and the regional Finance Department.

If the debtor concern is in liquidation, the writ of execution is served on the liquidator's committee, which applies the usual order of priorities.

A money award will state from which account the money is to be drawn, *e.g.*, current, capital construction, repair and maintenance, etc. An award need not, however, necessarily be expressed in money: it may order faulty work to be re-done, or property to be handed over.

Awards must be executed within a year from when execution was first possible, *i.e.*, the date of the award or the expiration of any time limit specified therein.

DUDLEY COLLARD.*

* Of Gray's Inn, Barrister-at-Law.

HUMAN RIGHTS IN ERITREA

THE Constitution of Eritrea, drafted by a United Nations Commissioner, adopted by the Eritrean Constituent Assembly in July, 1952, and ratified in August by His Imperial Majesty the Emperor of Ethiopia as Sovereign of the Federation, became effective with the withdrawal of the British administration in September of that year. Its basis is the separation of powers, subject to a limited power in the executive to control the legislature and appoint to the judiciary, and to a power in the judiciary to declare unconstitutional an executive order or a legislative act. The Constitution contains a list of fundamental human rights prescribed by the United Nations in its resolution of December, 1950, on the disposal of Eritrea, some of which (for instance the "right to exercise any profession") are "subject to the requirements of the law." The list prescribed by the United Nations ends with the general provision that:

> "The respect for the rights and freedoms of others and the requirements of public order and the general welfare alone will justify any limitations to the above rights";

and the Constitution adds:

> "The enjoyment of human rights and fundamental freedoms may be regulated by law provided that such regulation does not impede their normal enjoyment."

All existing laws were continued in force by the Constitution, but "in the event of a conflict between such laws and regulations and this Constitution, the Constitution shall prevail."

The idea of the citizen having any rights against the authorities being a startling innovation in Eritrea, resort to the Supreme Court in defence of constitutional rights has been rare, but five cases have arisen in the first two and a half years of self-government. The earliest case, decided in August, 1953, concerned the "right to freedom of opinion and expression," a newspaper having been suppressed by the withdrawal of its licence to print just before the persons concerned had been acquitted of a criminal charge of seditious libel. Under an Italian law no one could print without a licence, and the court held that this provision was constitutional as a means of raising revenue and of keeping the authorities informed of the existence and locality of printing presses; but that it was unconstitutional as a means of controlling the press, and that the withdrawal of the licence for this purpose was therefore unlawful.

The next case arose in October, 1953, out of the "right to life, liberty and security of person": certain persons detained

under extraordinary powers conferred on the executive by a British Proclamation (ordinance) issued when banditry was at its height in 1950, applied for orders in the nature of habeas corpus. These applications, however, were abortive, for the applicants were released before judgment was delivered.

In June, 1954, judgment was delivered in a case on the "right to freedom of peaceful assembly and association." By an Italian colonial law of 1939, it was a criminal offence to hold a public meeting without seventy-two hours' notice to the police, after which notice (although this was not directly in question) the police could forbid it for reasons of "public order, morality or health." A meeting had been held, without giving such notice, so peacefully that the police had heard nothing about it till some time later, when a prosecution was instituted. It was plain that prima facie the Italian law was in conflict with the Constitution, and the question was whether it was saved by the general permission to regulate the fundamental freedoms. The President (a Scot whose judicial experience had been in India) held that it was not, but the other two members of the bench (respectively Italian and Eritrean) held that it was. They said that it must not be assumed that powers would be abused, and that laws giving powers are therefore not unconstitutional merely because of the possibility of abuse. It must be remembered that Italian courts dealing with administrative orders insist on their being speaking orders, stating the reasons in full—a mere recitation that "for reasons of public order I forbid" will not do. If the order does not speak, or if the reasons recited do not bring it within the powers under which it purports to be issued, then not only will it be quashed (which would be of little use to those whose meeting had already been prevented) but disobedience to it is no crime.

In the same month of June was challenged a collective fine imposed by the executive under the same Italian law on a village whose inhabitants had persistently and anonymously victimised the tenant of an Italian landowner. The Supreme Court found that the law authorising such a fine did not conflict with any of the fundamental rights, and might be imposed by the executive to recoup the expense of stationing extra police, but could not be imposed by the executive as a punishment, since by the Constitution "judicial power shall be exercised by" the judiciary.

The latest decision arose out of a law passed by the Eritrean Assembly in 1953, regulating the forensic profession. This law absolutely disqualified any person who had ever "been convicted of any delict by any court in Eritrea," and a declaration of unconstitutionality was sought by a practitioner licensed by the British administration after he had been convicted of and fined for a petty offence which was nevertheless classified by the Penal Code as a delict. Judgment was delivered in February, 1955, that the

provision did not offend against the right that "retroactivity of penal law shall be excluded," which must be construed as referring only to laws imposing punishments in the strict sense. It did of course prima facie infringe the "right to exercise any profession" —indeed the whole Act was a prima facie infringement of that right—but the right is expressly "subject to the requirements of the law." It was held that the "requirements of the law" must themselves, to be constitutional, conform to the general conditions which "alone will justify any limitations to the above rights"; and accordingly, although the regulation of the forensic profession is prima facie justified as eminently in the public interest, "the criterion to which the law in question," said the Italian judge's leading judgment, "has resorted to obtain a particular standard of morality among those admitted to the profession is excessive in relation to the end to be attained . . . The provision attacked . . . since it makes no distinction (as it should) between a delict deserving serious moral obloquy . . . and a delict which is the result only of unintentional negligent conduct, constitutes an unlawful limitation of a fundamental freedom."

The resolution of the United Nations was greeted with considerable derision in learned quarters [1] when its contents became known; but it has proved in the hands of an independent judiciary to be not a useless weapon in the defence of liberty.

J. A. Clarence Smith.*

[1] (1951) I.L.Q. 221, 222.

* District Judge of Eritrea.

CORRESPONDENCE

My Lord,

Permit me some observations on your review of my "Philosophy of Law" (*Modern Law Review*, January, 1955, p. 82) simply to correct points of fact.

Your reviewer notes that the book has been translated into several languages "including Bulgarian; a compliment returned in the text by three paragraphs devoted to Bulgarian legal philosophy." Apart from the fact that only a small portion of my work has been translated into Bulgarian, the reader can see for himself that besides my very brief note on Bulgarian philosophy I have devoted much more space and emphasis to legal philosophy in Hungarian, Greek, Dutch, Danish, Swedish, Polish, Czech, etc., although my book has not been translated into any of these languages. There is thus no foundation for your reviewer's insinuation.

Your reviewer thinks the bibliography excessive. This may be true of the most recent period, for which the translator added numerous references without consulting me. But as regards authors up to the present century my historical account offers not merely "potted versions of philosophic systems" but many comments, and sometimes sharp criticisms. I believe in fact that my book, though far from perfect, presents a less incomplete history of legal philosophy than either the works which he cites or any other work hitherto published.

As for the systematic part, your reviewer insists on the difference between the Thomistic doctrine of natural law "as an emanation of God" and my view of law as derived from human nature. I was not attempting a work on theology, for which I am not competent, but I did seek to show that the results of the scientific investigation which I had attempted by the light of reason do not contradict but rather confirm those reached by the *philosophia perennis* from its dogmatic postulates. Perhaps your reviewer overlooked some observations on pp. 430–1 as well as the part of the book where I emphasised the distinction between natural law and positive law and the validity of the former as against the latter. Otherwise he could not have said that I "identify" these two types of law and remain "speechless" before the problem of their possible conflict.

The juridical limits of State power and the necessity of respecting the natural rights of the individual are themes asserted by me not merely "in two vague pages at the end of the book" but from the beginning (page 5) and on every relevant occasion (pp. 316–7, 369–70, 382–4, 442, 445, etc.). I thus had no need to restate them in an appendix. These themes, moreover, I have always in this and in my other writings maintained. It was for the defence of freedom that I volunteered for service in the First World War and that I joined the Fascist movement in the early days when it was a simple movement of resistance against the Bolshevik threat, long before it had become a government or even a political party; and I was expelled and victimised by the Fascist movement at a date before it took the fatal decisions which I, like all the world, deplore.

With all respect,

I am,

Yours faithfully,

GIORGIO DEL VECCHIO.

June 14, 1955.

NOTES OF CASES

The Crown and "Per Quod Servitium Amisit"
Are Policemen Servants? (No. 2)

A first note on the above subject in 16 M.L.R. 97 dealt with the wide range of opinions expressed by the High Court of Australia in *Att.-Gen. for N.S.W.* v. *Perpetual Trustee Co. Ltd.* [1952] A.L.R. 125; 85 C.L.R. 237. The same case has now been decided on appeal by the Judicial Committee of the Privy Council: [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846. In an opinion delivered by Viscount Simonds, the Board affirmed the majority decision of the High Court holding that the Crown could not recover damages against a defendant whose negligent injuring of a police constable led to the Crown losing the latter's services and being prematurely committed to retiring him on pension.

As indicated in the first note, the several High Court opinions gave many reasons for supporting a decision either way. The single Board opinion has the convenience of giving more restricted reasons, but these have even wider possible implications than had the reasoning which prevailed below.

The "Goodhartian" ratio of the Board's decision is clear and unobjectionable, and so is a first extension to loss of services of a member of the armed forces; on the latter point, the majority opinion of the High Court in *Commonwealth* v. *Quince* (1944) 68 C.L.R. 227 is approved. The conflicting decisions in *Bradford Corporation* v. *Webster* [1920] 2 K.B. 135 and *Att.-Gen.* v. *Valle-Jones* [1935] 2 K.B. 209 are disapproved and will presumably be treated by the English courts as overruled; the House of Lords has by no means always faithfully followed Judicial Committee decisions, as can be seen by comparing *Commonwealth Trust* v. *Akotey* [1926] A.C. 72 (J.C.) with *Jones* v. *Waring and Gillow* [1926] A.C. 670 (H.L.), and *Robinson* v. *South Australia* [1929] A.C. 469 (J.C.) with the *Thetis Case* [1942] A.C. 624 (H.L.), but in the present instance the decision is too specific and based on generally applicable principles of the unenacted law to be readily distinguished.

The Judicial Committee has come down on the side of the Australian "modernists" (Fullagar and Kitto JJ.), who regarded the action *per quod servitium amisit* as a barbarous survival, not to be extended any further than imperative authority, narrowly construed, requires. But in seeking reasons for excluding police and military service from the scope of the action, the Board has produced an explanatory hypothesis which while related to theories

canvassed below produces a different emphasis. The Board puts its stress on what it considers a "fundamental" distinction between "public office" on the one hand and "private domestic relations" on the other. The "public officer," though often called a servant, is said to have an "original" authority, meaning one not derived from the command of a master, whereas the master's authority is the essential feature of private service. This notion was not absent from the reasoning in the High Court, but there the principal stress was on the conception of fealty which distinguishes military and police service not only from private service, but also from other forms of public service.

It is suggested with respect that the Board's emphasis is unfortunate. It fails to supply any satisfactory explanation of the military case, where command rather than independent authority is most prominent. Even the police carry out a great many duties which are properly traceable to a "command" situation, notionally culminating, with the highly centralised police systems of the Australian states, in a Minister of the Crown. Moreover, although the Board points out that the question of vicarious liability of the Crown does not necessarily depend on the same considerations as those applicable to the instant problem, their Lordships did rely to a considerable extent on analogies drawn from such unfortunate decisions as *Enever* v. *R.* (1906) 3 C.L.R. 969, whose ludicrous consequences can be seen in *Baume* v. *Commonwealth* (1906) 4 C.L.R. 97 and *Field* v. *Nott* (1939) 62 C.L.R. 660; thus we are threatened with an extension of the pestiferous doctrine which insulates the public treasury from responsibility for many kinds of official wrong, because of an antiquarian concentration on what "The Crown" can command, when a more contemporary approach would be to inquire merely whether the officer in question is carrying on the business of government. Since the actual practice of governments usually accepts financial responsibility for the wrongdoings of soldiers and police, and discretionary torts of other servants, it is difficult to see why the courts should go out of their way to encourage doctrines which remove such claims from the sphere of enforceable right, relegate them to treasury discretion, and create in practice merely the opportunity for the private citizen to be mulcted in costs. However, this aspect of the present decision is an implication from its explanatory hypothesis, and it is to be hoped that the courts will show the frequent distrust of such hypotheses which justifies the peculiar boast that the law of England is not logical.

G. SAWER.

THE PARAMOUNTCY OF THE CHILD'S WELFARE

THE recent decision of the Court of Appeal in *Re Aster (an infant)* [1] provides a convenient background for a re-examination of the principles relating to the custody of children as enacted in section 1 of the Guardianship of Infants Act, 1925. Although *Re Aster* itself is disappointingly devoid of any mention of that provision, the case is of considerable importance as a reinforcement of the tendency shown in *Re Collins* [2] in construing the section; to that extent it displays a further reaction against the decision in *Re Carroll*.[3]

The facts in *Re Aster* were unusual—

> In May, 1952, a girl was born of an illicit union of a young girl of twenty with a married man many years her senior. The parents subsequently quarrelled and the mother who was a Roman Catholic handed the infant to a Catholic Society with a view to adoption [4]; she maintained this attitude throughout the proceedings. The father, who, as Evershed M.R. pointed out,[5] had never denied paternity and had displayed considerable affection for the child, applied for custody.[6]

The Court of Appeal, in confirming Harman J.'s order giving custody to the father, skirmished with the problems consequent upon the earlier judicial pronouncements on section 1 of the 1925 Act by considering the principles applicable without, however, reciting that section or considering the interpretations placed upon it. The section reads as follows:—

[1] [1955] 1 W.L.R. 465; [1955] 2 All E.R. 202 *sub nom. Re A (an infant)*; the court consisted of Evershed M.R. and Jenkins L.J. only, the appeal being interlocutory, see *Chinchen* v. *Chinchen* [1950] W.N. 22 at p. 23 *per* Bucknill L.J. Similarly, *Re Collins* [1950] Ch. 489 was technically dealt with as an appeal out of time and on these grounds the application was refused, although the court dealt fully with the substance of the case were it to grant leave to appeal out of time.

[2] [1950] Ch. 489.

[3] [1931] 1 K.B. 317.

[4] Harman J. had apparently expressed the view, [1955] 2 All E.R. 202 at p. 205, asterisked footnote, that the "father's objections would be fatal to any adoption by a stranger." The Court of Appeal recently held in *Re M (an infant)* [1955] 3 W.L.R. 320; [1955] 2 All E.R. 911 that a father is not a "parent" within the meaning of that word in s. 2 (4) (*a*) of the Adoption Act, 1950.

[5] He said that the case was unique "in that here the putative father [was] very much on the scene" (p. 468).

[6] The proposal for the child's upbringing was for her to be put in the care of the father's brother and his wife who in turn undertook to bring the child up as a Roman Catholic. A good deal concerning this undertaking was made by counsel for the mother inasmuch as the father's relatives were not themselves strong adherents to that faith and none of their three children was brought up according to the tenets of Roman Catholicism. The contention that therefore the undertaking lacked sincerity and could not be accepted at its face value was rejected by Evershed M.R. (at p. 469). On the court's attitude to religious views, see Lord Hewart C.J. in the Divisional Court in *Re Carroll* [1931] 1 K.B. 317 at p. 323 and Scrutton L.J. in the Court of Appeal at p. 336; also *Re Collins* [1952] Ch. 489.

> "Where in *any* proceedings before any court . . . the custody or upbringing of an infant . . . is in question, the court in deciding that question, shall regard the welfare of the infant as the *first* and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, is superior to that of the mother or the claim of the mother is superior to that of the father." [7]

At first blush the section appears to sweep away all the old rules and substitute an entirely new approach. Strikingly, the courts have laid down that the section does not alter the pre-1925 law [8] and the preamble to the statute strengthens this contention.[9] Such an interpretation requires a reading of the section whereby the second limb limits the application of the first to the extent that the section can only be invoked in cases where the suit is contested by the parents of the child or by the relatives of the parents.[10] The section is thus not read as a whole, the second

[7] Italics supplied.

[8] In *McKee* v. *McKee* [1951] A.C. 352, a case before the Judicial Committee of the Privy Council on appeal from Canada concerning the effect of the rules of private international law on s. 1, Lord Simonds said (at p. 366): "But they [their lordships] would add that too much stress should not be laid on the provisions of the Guardianship of Infants Act, 1925. S. 1 of that Act introduced no new principle of law, but merely enacted the rule which had long been acted on in the Chancery Division of the High Court of Justice." See also *Re Collins* [1950] Ch. 489 at p. 505–6; *W.* v. *W.* [1926] P. 111; *Re Thain* [1926] Ch. 676 *per* Lord Hanworth M.R. at p. 689 and Sargant L.J. at p. 691; *Re Carroll* [1931] 1 K.B. 317 *per* Scrutton L.J. at p. 337 and Slesser L.J. at p. 355; *contra* Greer L.J. at p. 348. Similar views were expressed in the Scottish case of *Hume* v. *Hume*, 1926 S.C. 1008 *per* Lord Sands at p. 1015 and Lord President Clyde at p. 1013. Followed in *M.* v. *M.*, 1926 S.C. 778; *Christison* v. *Christison*, 1936 S.C. 381; *M'Lean* v. *M'Lean*, 1947 Sc.L.T. 36 at p. 41. Although the 1925 Act did not apply to Northern Ireland a statement to similar effect by Lord Merriman P. in Halsbury, Vol. 17, (1935) 658–9 was quoted approvingly by the court in *Re E. A. W. & M. W. infants* [1949] N.I. 1. See also *Allen* v. *Allen* [1948] 2 All E.R. 413 based on a care and control case. Compare New Zealand decisions based on an identical provision in s. 2 of the Guardianship of Infants Act, 1926, *Re Butler* (*an infant*) [1931] N.Z.L.R. 121 and *Miller* v. *Low* [1952] N.Z.L.R. 575 *per* F. B. Adams J. at p. 588.

[9] The preamble reads as follows: "Whereas Parliament by the Sex Disqualification (Removal) Act, 1919, and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby." On the use to which preambles can be used in construing a Statute, see Maxwell on *Interpretation of Statutes*, 10th ed. (1953) p. 46. The only apparent deviation from this interpretation appears in *Chipperfield* v. *Chipperfield* [1952] 1 All E.R. 1360. There, on an application to vary an order, the Divisional Court held that justices were wrong in holding that to succeed the husband must show that the wife has been guilty of misconduct. Pearce J. said (at p. 1361): "S. 1 of the Act is deliberately framed in the widest terms to secure consideration of the infant's interest in any court where its custody or upbringing is at stake."

[10] This must be considered to be the effect of *Re Carroll* [1931] 1 K.B. 317 as distinguished in *Re Collins* [1950] Ch. 489. Indeed, this was predicated by Lord Sands in *Hume* v. *Hume*, 1926 S.C. 1058 at p. 1015.

limb of the section only then being the enactment of the legislature's intent as recorded in the preamble. It is necessary in the prevailing circumstances to imply an "id est" before the words "it shall not take into consideration etc. . . .", thereby limiting the apparent effect of the opening words of the section.

The present position can be analysed as follows:—

1. In cases when one party to the suit is neither a parent nor a relative, section 1 is inapplicable and the rules relating to the supremacy of parental rights pertain: *Re Collins* and *Re Carroll*.

2. When rival claims are made by parents or relatives, the paramountcy rule prevails. It seems, however, firstly that the test of the welfare of the child is deducible only by reference to the relative merits of the proposed future for the child put forward by the parties and not by any objective test whereby the proposals by the parties are merely considered by the court.[11] This view finds expression in *Re Aster* where Evershed M.R.,[12] whilst recognising that "paramount" was not synonymous with "exclusive," did give effect to the provision that the child's welfare shall be "first and paramount."[13] Significantly, however, reference was made to the behaviour of the respective parents *vis-à-vis* the child in a passage from the Master of the Rolls' judgment to the effect that[14] "the present appeal is to be attributed in some measure to that bitterness, and in some measure to religious zeal rather than to the single purpose of the welfare of the child."[15]

Section 1 of the 1925 Act has made some inroad on the old law; but just as in 1925 it was necessary to legislate in conformity with social conditions regarding sexual equality, so in 1955 the needs of contemporary society demand that in all cases involving an infant the paramountcy rule shall prevail and that the wishes of both parents shall be taken into account in arriving at what is best for the welfare of the child.

It is submitted that the objection that this would entail the court constituting itself as a board of child welfare is not fraught with consequences of any difficulty. The courts, in exercising

[11] Thus only within narrow limits can the court vary a proposed arrangement. It cannot substitute its own solution for the child's upbringing.

[12] At p. 468.

[13] Welfare is obviously not the sole consideration, but the method of approach and order of priority of factors is important. Some effect must be given to the word "first" otherwise it becomes tautologous; Morton J. in *Re B. . . .'s Settlement* [1940] Ch. 54 at p. 63. See also Evershed M.R. in *Clarke* (*otherwise van der Zaan*) v. *Clarke* (1955) *The Times*, May 25.

[14] At p. 467.

[15] Similarly, in *Wakeham* v. *Wakeham* [1954] 1 W.L.R. 366 at p. 368 Evershed M.R. commented: ". . . the proceedings before Collingwood J. and the present appeal . . . seem to me to be in the nature of manoeuvres by the husband and the wife to gain technical advantages."

their jurisdiction on behalf of the Queen as *parens patriae* [16] should be equal to a task which would cause no more anxiousness [17] than these cases presently do.[18]

L. J. Blom-Cooper.

Delay in Applications for Mandamus

By *Re Brixham U.D.C.; Re Totnes U.D.C.* [1955] 1 W.L.R. 426, attention has been drawn to the rule that an application for a mandamus will not be granted after a reasonable time has elapsed. The facts arose from the nationalisation of electricity and gas undertakings in 1947 and 1948 respectively. After their transference to public ownership electricity undertakings paid a contribution instead of the usual local rates, but gas undertakings continued to be rated. A valuation officer drew up proposals for putting the South Devon gas undertaking in the rating valuation list for the years 1951–53, but the gas board objected on the ground that the proposals included the insertion in the valuation list of an assessment of a hereditament which was not previously included in the list. The officer appealed against the objection, but he withdrew his appeal and the proposals shortly before they were due to be heard by the Local Valuation Court. The report shows that the Brixham U.D.C. stood to lose £5,000 in rates if the appeal and proposals were not considered by the Valuation Court, and the Brixham, Totnes and Salcombe councils applied for an order of mandamus to compel the Valuation Court to hear them. The Divisional Court, however, dismissed the application upon grounds which need not be considered here. A subsequent application for leave to appeal to the Court of Appeal should have been made within four days of the Divisional Court's decision, but it was delayed on account of negotiations between the applicants and the county council and the Ministry of Housing and Local Government, as well as by the indecision of the Salcombe U.D.C. as to whether it should take part in the appeal, and its eventual withdrawal from the litigation. The Court of Appeal refused the application for leave to appeal because it was out of time, but Singleton L.J. said that, speaking for himself alone (Romer L.J., the other member of the court, gave no opinion at all on the matter), he thought it would have been better if the councils had been heard before the

[16] *Eyre* v. *Shaftesbury* (1725) Gib.Rep. 172; 25 E.R. 121.

[17] Evershed M.R. in *Re Aster* (at p. 466) noted that "all these cases are necessarily anxious cases."

[18] Frequently, moreover, a court expresses itself in terms which suggest that it would welcome a freer hand in matters involving the welfare of children. The Court of Appeal's reiteration in *Fisher* v. *Fisher* (1955) *The Times*, June 23, *per* Singleton L.J. that the matter is always one for the discretion of the judge of first instance is an indication that the courts regard the matter as containing an element of elasticity in the application of the principles.

Valuation Court. In his opinion what took place was a hearing at which they were entitled to be heard despite the purported withdrawal of the appeal, but they had taken so long over their application for leave to appeal that it could not be acceded to.

Although this case turned upon an application for leave to appeal it is perhaps of some interest to examine the judicial attitude towards delay in applications for mandamus itself. Cases in the nineteenth century point to the development in this field. In *Ward* v. *Lowndes* (1859) 29 L.J.Q.B. 40, the Statute of Limitations was held not to bar an application for the writ, as it then was, and yet a much shorter period of time was held to be fatal in *Coke* v. *Jones* (1861) 4 L.T. 306. There a county court judge had directed the jury that the plaintiffs were entitled to verdict in a dispute, but with only nominal damages. The jury, however, returned a verdict for £10, whereupon the judge directed a verdict for one shilling to be entered. More than a year was suffered to elapse before the plaintiffs moved for a rule calling upon the county court judge to enter the verdict pursuant to the finding of the jury, and the application was held to be too late. A delay of only three months was held to be a subsidiary ground for the refusal of the writ in *R.* v. *Robson* (1893) 9 T.L.R. 163, though it was doubtful whether a delay of such short duration could stand alone as a ground.

The position was clear by the time of the case of *Croydon Corporation* v. *Croydon R.D.C.* [1908] 2 Ch. 321. Special expenses for drainage works had been incurred by the plaintiffs upon terms the result of which was that money was due each year from the defendants to the plaintiffs, and the amount so due was recoverable by the defendants from three contributory parishes, for whose benefit the special expenses were incurred. By mistake the plaintiffs did not for several years call upon the defendants to pay the full amount properly due, and less was paid until September, 1904. In April, 1905, the plaintiffs drew attention to the mistake, and called upon the defendants to pay the balance due in respect of several previous years up to September, 1904, and to make payments for the future upon a proper footing. The defendants paid on the lower scale till September, 1905, and thenceforward paid in full. They were unable to recover part of the arrears from the contributory parishes, and declined to pay the arrears; whereupon the plaintiffs brought an action to recover the arrears, and for a mandamus to enforce the levy of a rate to satisfy them. The defendants admitted that the plaintiffs were entitled to judgment for the arrears, but contended that a mandamus to enforce payment of a retrospective rate would be illegal. Cozens-Hardy M.R., Buckley and Kennedy L.JJ. in the Court of Appeal held, however, that the court had a discretion to grant a mandamus to enforce the levying of a rate to meet obligations for special expenses of former years, if the circumstances

justified it; that there was no reason for granting a mandamus to enforce payment of the arrears up to 1904; but that, inasmuch as a demand was made and might have been complied with in the course of the current year 1904–5, a mandamus ought to be granted to enforce payment of the amount due for that period.

The rule seems established beyond doubt that negligence or unreasonable delay on the part of an applicant for a mandamus will lead to a refusal of the remedy, and the position does not appear to have been affected either by the Limitation Act, 1939, or by the Law Reform (Limitation of Actions, etc.) Act, 1954. "*Vigilantibus et non dormientibus jura subserviunt*" (*R.* v. *Fowey Corporation* (1824) 2 B. & C. 584, 591, *per* Abbott C.J.). In view of Singleton L.J.'s remarks in the *Brixham* case it is unfortunate that a technicality had defeated the councils' attempt to appeal from a decision of the Divisional Court. If their delay had been merely in the original application for a mandamus, and it had not amounted to negligence, their subsequent appeal might well have been received with favour by the learned Lords Justices.

D. C. M. Yardley.

Annulment of a General Election

The case of *Simpson* v. *Att.-Gen.* [1955] N.Z.L.R. 271 must surely be unique in the strict meaning of that much-abused word, for the plaintiff sought a declaration that the General Election in New Zealand in 1946 was void and destitute of legal effect; that, consequently, New Zealand had been without a legislature since 1946 and, possibly, without a Government since that time and that, as a further consequence, all legislation passed since the date of that election by the body purporting to be the New Zealand Legislature was void.

The plaintiff's claim rested on the interpretation of s. 101 (1) of the Electoral Act, 1927 (N.Z.). That section provides that for every general election the Governor-General shall, not later than seven days after the date of the dissolution or expiry of the last Parliament, as the case may be, by Warrant under his hand . . . direct the Clerk of the Writs to proceed with the elections.

The Parliament elected in 1943 expired by effluxion of time on October 11, 1946. It was agreed on all sides that the Governor-General's Warrant was not issued until November 6, 1946—seventeen days later than the time specified by section 101. The point at issue therefore resolved itself into the question whether the provisions of section 101 were mandatory or directory. The Court of Appeal, affirming Barrowclough C.J., held that those provisions were directory and that the failure to comply with them did not invalidate the subsequent General Election. The Court of Appeal based its conclusions on the judgment of the Privy

Council in *Montreal Street Tramway Co.* v. *Normandin* [1917] A.C. 170 in which it was said (at p. 175), that " when the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious inconvenience . . . it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

That to hold the provision referred to to be mandatory would undoubtedly " work serious inconvenience " is beyond doubt and, in view of New Zealand's constitutional position as a self-governing Dominion, it is a little difficult to see how the allegedly invalid legislation could have been validated. Perhaps the way out of that difficulty would have been the passing of an Imperial Act validating the legislation, notwithstanding the Statute of Westminster, because New Zealand did not adopt or, if the plaintiff's contention was correct, did not purport to adopt, the Statute of Westminster until 1947. Legally, if not conventionally, the Imperial Parliament could then have legislated for New Zealand.

Another interesting feature of the case was the fact that one of the judges in the Court of Appeal, McGregor J., owed his appointment to a statute passed in 1953 so that the validity of his appointment (*inter alia*) was an issue in the action. The Court of Appeal side-stepped this difficulty by obtaining the assent of the plaintiff, who appeared in person, to the appeal being heard by the court as constituted. This, it is submitted with respect, was a doubtful solution of the problem, for it is hard to see how a litigant, merely by giving his consent, can elevate to the status of a judge a person not properly appointed to that office.

Whatever may be the moral of *Simpson's* case, it is certain that hereafter the provisions of the Electoral Act will be strictly complied with.

A. G. Davis.

Law Reporting and the Revision of Judgments

It is well known that the reports of *ex tempore* judgments are revised by the judges before they appear in the *Law Reports*, and indeed it is largely this revision which bestows upon this series of reports its semi-official character. But it has generally been assumed that such revision is limited, as it is in the case of speeches made in Parliament and reported in *Hansard*, to matters of detail only, such as the improvement of grammatical structure or the removal of an ambiguity which was not apparent in the spoken word but which is revealed in print.

It appears, however, that revision may include the deletion of whole paragraphs of the judgment as delivered. Thus, the report of the case of *Kwei Tek Chao* v. *British Traders*, as it appears in

the *Weekly Law Reports* [1954] 2 W.L.R. 365, at pp. 371–2 and pp. 378–9, and in the *All England Law Reports* [1954] 1 All E.R. 779, at p. 788 and pp. 792–3, contains two passages in the judgment of Devlin J., which do not appear in the "final" *Law Reports* in [1954] 2 Q.B. 459, where the appropriate pages would be 477 and 483.

This information may provoke widely differing reactions. On the one hand will be those who ask whether law teachers have nothing better to do than to go round comparing various versions of the same judgment; posterity will be concerned only with the version in the *Law Reports*, and in any case it is common form and common knowledge that judges do rewrite their judgments for publication in the *Law Reports*. At the other extreme stand those who see in such a procedure an attack at the very root of our doctrine of judicial precedent, leading ultimately to the conclusion that the law is to be found, not in what the judge did, nor yet in what he said, but rather in what he said he said.

We know, of course, that some of the best of the old reporters made no attempt to take down the very words of the court, and we know too that passages in judgments are not to be treated as if they were sections of an Act of Parliament. But if revision of judgments is carried to this extent, we ought to acknowledge openly that the *Law Reports* may not in fact contain the most accurate version of the judgment which was delivered, although it may be the version of which the judge finally approved, either because of second thoughts, or because the judgment as delivered was too long. And, although the subsequent omission from the *Law Reports* will obviously affect the weight of the dicta as authority, yet it cannot wipe them completely from the slate of legal memory, and it should surely not be open to a court afterwards to reject the full report on the grounds of inaccuracy.

For the purpose of this note, it can be conceded that the two passages in the case cited, although they can hardly be dismissed as *obiter dicta*, did not affect the substance of the judgment, as they only gave additional support for a reasoning already adopted by the judge. But if revision were to go further, so as to change in effect the reasoning, then obviously our moderate interpretation of the significance of the revision of judgments would itself have to be revised.

C. F. Parker.

Master and Servant

The decision of the Court of Appeal in *Denham* v. *Midland Employers' Mutual Assurance, Ltd.*,[1] brings to the surface certain implications which have been lurking in master and servant cases

[1] [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561.

over recent years. In this case the employers of a labourer had loaned his services to contractors who were doing work on the employers' premises. The labourer was working at unskilled tasks and was under the direction and supervision of the contractors' foreman, but his wages were still paid by his general employers who also paid his insurance contributions and reserved the right to dismiss him. The labourer was killed through the negligence of the contractors, who were protected from such events by two policies of insurance, the one covering accidents to "any person under a contract of service" and the other covering accidents to persons other than "any person under a contract of service." The action was brought to determine which insurance company was liable to indemnify the contractors, *i.e.*, to decide whether the labourer had been "under a contract of service" with the contractors or not.

On this simple point of interpretation the Court of Appeal (Denning, Birkett and Romer L.JJ.), was unanimous in its confirmation of the decision of the Lord Chief Justice that the labourer was not under a contract of service with the contractors. Such a conclusion was inevitable. There was no contractual connection between the labourer and the contractors, and, as Denning L.J. remarked, "No contract of service can be transferred from one employer to another without the servant's consent; and this consent is not to be raised by operation of law but only by the real consent in fact of the man, express or implied: see *Nokes* v. *Doncaster Amalgamated Collieries*." [2]

The interest of the decision lies, however, not in this simple interpretation of an insurance policy but in the wider aspects of the master-servant relationship raised by the Court of Appeal. For the court made it clear that, had the deceased labourer himself caused injury to a third party while working for the contractors, the contractors would have been held vicariously liable for that injury. The proposition that emerges is that, although X may be under a contract of service with Y (his general employer), Z (the temporary employer of X) may be liable for X's tortious acts, even though there has been no transfer of the contract of service to Z. The relationship of master and servant in the sphere of vicarious liability is thus finally divorced from the idea of a contract of service. It is not suggested that this idea is novel to *Denham's* case for it had already been raised in the *Mersey Docks* case,[3] but *Denham's* case makes the point more explicit.

[2] [1940] A.C. 1014; [1940] 3 All E.R. 549. See too *Mersey Docks Harbour Board* v. *Coggins and Griffith* (*Liverpool*) *Ltd.* [1947] A.C. 1, at p. 14, *per* Lord Macmillan.

[3] [1947] A.C. at p. 15 where Lord Porter said that where a servant was loaned by one employer to another the contract of service "has only an indirect bearing on the question which of them [the two employers] is to be regarded as master of the workman on a particular occasion."

Denham's case invites us to consider another issue of very real social importance, the question of the nature and extent of the temporary employer's duty to take care towards the transferred workman. If the contract of service exists only between the workman and his general employer, is the duty of care owed by the temporary employer to the workman less than the duty commonly owed by a master to his servant? Is it, possibly, only the duty owed by an invitor to an invitee? This was of course the view taken by the House of Lords in the unhappy decision in *London Graving Dock, Ltd.* v. *Horton*,[4] which opened up the strange rift between the securely protected position of the servant-workman-plaintiff and the dangerous insecurity of the invitee-workman-plaintiff. *Horton's* case presented the lower courts with a crisis in their approach to the plaintiff-workman who was suing a defendant on whose premises or under whose direction he had been working but with whom he had no contract of service. For the courts had to decide how far *Horton's* case must be taken to relegate such plaintiffs to the frail category of invitees, or, on the other hand, in what circumstances the line of argument in *Horton's* case might be rejected and the workman regarded as being on the same footing as a servant of the temporary employer. It is with relief that we can record that the courts have been ready in some instances to distinguish *Horton's* case and to extend the concept of a servant to cover such workmen.

So, in *Garrard* v. *A. E. Southey and Co., etc.*,[5] the temporary employer to whom the plaintiff was loaned by the general employer was held by Parker J. to owe a duty of care to the plaintiff co-extensive with the duty owed by a master to his servant. The same suggestion is now made in *Denham's* case, where Denning L.J. said:

> "I have myself no doubt that if a third person had been injured by the negligence of Clegg [deceased workman] in the course of his work, then Le Grands [temporary employer] and not Eastwoods [general employer] would be liable to the third person. So also when Clegg himself was killed Le Grands are liable to his widow *on the same footing as if they were his masters and not merely as invitors.*"

This view is confirmed by the recent important decision in *O'Reilly* v. *Imperial Chemical Industries, Ltd.*,[6] where the plaintiff, a lorry driver, was on loan with his lorry from his general employers, British Road Services, to I. C. I., and was injured through a defective system of working provided by I. C. I. Oliver J. held

[4] [1951] A.C. 737; [1951] 2 All E.R. 1.
[5] [1952] 2 Q.B. 174; [1952] 1 All E.R. 597.
[6] [1955] 2 All E.R. 567. Where dock workers are allocated by the Dock Labour Board to particular employers it has been held that they must be regarded as the servants of those employers. See *Powell* v. *Docks and Inland Waterways Executive* (1950) 83 Ll.L.R. 107, (C.A.).

I. C. I. liable to the plaintiff on the ground that they were his "quasi-employers" (an interesting term reminiscent of Denning L.J.'s "as if they were his masters").

The outcome of *Denham's* case and these other decisions is that the old view of the master and servant relationship as arising out of a contract of service appears too rigid for modern conditions. A blanket concept of what is a servant will not meet contemporary social needs, and the courts are displaying an encouraging flexibility in their concentration on real social problems rather than on fixed legal categories. But the question which must ultimately be faced is whether there is any utility in preserving the concept of a servant for any purposes in the modern law or whether it may not be an obstruction which hinders the proper development of different doctrines for different real situations.

G. B. J. Hughes.

Judicial Control of Imposed Contracts

It is not surprising that in a post-war climate of opinion that is sensitive to the vulnerable position of consumers, the courts should have applied the doctrine of penalties to regulate one part at least of the minimum payment clause which is common form in standard hire-purchase contracts.

The clause is one which requires a hirer of goods under a hire-purchase agreement to pay the owner a certain sum of money if the agreement should be terminated, whether by the hirer himself in exercise of his right to return the goods or by the owner on breach of contract by the hirer, like default of payment, or on any other specified event, like the hirer's death or bankruptcy.

In *Cooden Engineering Co. Ltd.* v. *Stanford* [1953] 1 Q.B. 86 (noted by Prof. Sawer in 16 M.L.R. 375), the "hire-purchaser" of a motor-car signed a contract by which he agreed to pay the entire balance outstanding of the hire-purchase price should the hiring be terminated by the owner on the occurrence of any of a number of events including failure to maintain due payment of instalments. The Court of Appeal held that, so far as the minimum payment clause stipulated for payment of money on termination of the contract by the owner because of a breach of contract by the hirer, the doctrine of penalties applied and operated, in that case, to relieve the defaulting hirer of the over-onerous obligation.

Recently, in *Lamdon Trust, Ltd.* v. *Hurrell* [1955] 1 W.L.R. 391; [1955] 1 All E.R. 839, Denning L.J. (sitting as a court of first instance) had occasion to consider a clause less severe than that in *Cooden's* case. It required the hire-purchaser of another motor-car, from whom the finance company owner had recovered possession because he was in arrears with his instalments, to pay the company such sum as would, together with moneys already paid,

make up approximately 75 per cent. of the hire-purchase price: this, in addition to a "good order, repair and condition" term in the contract. Denning L.J. struck down the "75 per cent. clause," holding it to be "altogether exorbitant" (393): it "was not a genuine pre-estimate of damage but was an extravagant and extortionate sum held *in terrorem* over the head of the hirer" (395).

If one were to try to read between the lines, one might surmise that the courts are quietly shepherding hire-purchase traders and finance companies towards the 50 per cent. minimum payment clause permitted by the Hire-Purchase Act, 1938, ss. 4 (1) and 5 (*c*), for dealings falling within its provisions.[1]

It should be noted that Denning L.J., did not refer to the validity of the minimum payment clause when it is invoked on the occurrence of a specified event other than a breach of the contract by the hirer. In such case, the doctrine of penalties is not operative, since it has long been clear that it applies only in the event of a breach of contract. This, and no more than this, it should be emphasised, was held by the Court of Appeal in *Associated Distributors, Ltd.* v. *Hall* [1938] 2 K.B. 83.

But it would follow logically that, in the absence of some countervailing rule of common law or equity, the law is here reduced to the not very amusing absurdity that a hirer who fails to pay his instalments in breach of contract may escape the burden of the minimum payment clause, but that a hirer who, unable to continue payments, returns the goods of his own accord may be penalised under the clause: and so too for the other cases of non-breach of contract.

Slesser L.J., in *Associated Distributors, Ltd* v. *Hall*, appeared to think that there was no countervailing rule of case-law to relieve the hirer in such eventualities. But, in *Cooden*, Somervell L.J. (as he then was), did not take so pessimistic a view. In commenting upon *Re Apex Supply, Ltd.* [1942] Ch. 108 (Simonds J., as he then was), where a minimum payment clause was enforced in respect of goods recovered by the owner when the hiring company had gone into liquidation, Somervell L.J. said: "Though it may well be that the conclusion would be the same, *it might fall to be considered on equitable rather than on common law principles.*[2] If anyone desires to argue that the conclusion should be different in the case of a death or an event such as bankruptcy or liquidation, so far as my judgment is concerned I desire to make clear that that point is open" (*supra*, 98).

[1] The 50 per cent. clause may itself, in theory, be a coercive penalty on the facts of a particular case; s. 5 (*c*) it should be remarked does not exclude the application of the case-law doctrine where the hirer is in breach of a contract governed by the provisions of the Act.

[2] Italics added

This interesting observation may be allowed to sink back into the limbo of abortive dicta. It may, on the other hand, mark the beginning of a development of great significance: a fresh readiness by the courts in appropriate cases and subject to the limits fixed by firm precedents to re-examine general principles of equity as criteria for the solution of modern legal problems.

There is an early principle of equity which is, on the face of it, couched in terms large enough to cover the situations arising under the minimum payment clause where there has not been a breach of contract. It was expressed in its most general form by Lord Hatherley in *O'Rorke* v. *Bolingbroke* (1877) 2 App.Cas. 814, at 823, as follows:

"It sufficiently appears that the principle on which Equity originally proceeded to set aside such transactions was for the protection of family property; but this principle being once established, the court extended its aid to all cases in which the parties to a contract have not met upon equal terms. In ordinary cases each party to a bargain must take care of his own interest . . . ; but in the case of . . . persons under pressure without adequate protection, *i.e.* in the case of dealings with uneducated ignorant persons, the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract."

It is true, this principle has in the past been applied to cases of expectant but inexperienced heirs and persons disposing of their property at an unconscionably small price who have been without independent advice, ignorant to the point of illiteracy and poor to the point of destitution. But there is no authoritative decision limiting the scope of the principle to the type of situation where it was invoked in past litigation. Of course, the customer today, who buys under hire-purchase, is seldom illiterate, but he is rarely able to read let alone understand a modern hire-purchase contract; and, of course, he is not usually destitute, but he normally has recourse to hire-purchase because he is "in distress" in the sense of being too poor to buy the goods outright; nor does he normally enjoy independent advice or the possibility of modifying terms when he signs the contract, but must "take it or leave it." In the real circumstances of everyday business, "oppression" remains possible through the minimum payment clause of a hire-purchase contract even if the pathos and melodrama of the older situations have been toned down by universal education, the social services and full employment. There is, in my respectful submission, a good case for reconsidering the application of this early principle of equity in the changed conditions of modern life and commercial transactions.

C. Grunfeld.

Rent Acts Cases

A treatise could well be written on the Interpretation of Statutes using nothing but cases on the Rent Acts as illustrations. The complexity and unsatisfactory draftsmanship of those Acts give ample scope for the application of every known canon of construction. In *Dean* v. *Wiesengrund* [1955] 2 W.L.R. 1171; [1955] 2 All E.R. 432, for example, two Latin maxims were called in aid, although in fact the court refused to apply either of them. Section 14 (1) of the 1920 Act provides that overpayments of rent can be recovered "from the landlord . . . who received the payment, or his personal representative, by the tenant . . . by whom it was paid." The county court judge had held, following two Irish cases, that from the express reference to the landlord's personal representative and the omission of a similar reference to the tenant's it should be inferred that the tenant's personal representative could not recover sums overpaid by the tenant during his life. The Court of Appeal however decided that this was not a case for the application of the rule *expressio unius exclusio alterius*. Jenkins L.J. cited the comment of Lopes L.J. in *Colquhoun* v. *Brooks* (1888) 21 Q.B.D. 52, 65 that this rule "is often a valuable servant, but a dangerous master in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident and the maxim ought not to be applied, when its application, having regard to the subject matter to which it is applied, leads to inconsistency or injustice." As there seemed to be no satisfactory reason why Parliament should have deprived the tenant's estate of this asset, the court declined to apply the maxim to this section.

A further point arose as to whether, if the court was wrong on the construction of section 14 (1) of the Act of 1920, and the tenant's personal representative was excluded, the position had been altered by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1. That section provides that subject to certain exceptions all causes of action vested in a person at his death survive for the benefit of the estate. The landlord's counsel argued successfully before the county court judge that this section did not affect the particular provisions of the Rent Acts because of the maxim *generalia specialibus non derogant*. But the Court of Appeal rejected the application of this maxim also, on the grounds that (i) the 1934 Act had listed its own exceptions, and (ii) the 1920 Act had not so unambiguously and expressly dealt with the matter as to oust the provisions of the 1934 Act. It may be mentioned that a similar attempt to apply the maxim *generalia specialibus non derogant* to the 1934 Act failed in *Att.-Gen.* v. *Canter* [1939] 1 K.B. 318 on the ground that the words were too clear to admit the application of the rule.

In *Paisner* v. *Goodrich* [1955] 2 W.L.R. 1072; [1955] 2 All E.R. 330, the binding force of case law in the interpretation of statutes was in issue. The Rent Acts apply to a house or part of a house "let as a separate dwelling." Since *Neale* v. *Del Soto* [1945] K.B. 144, these words have been held to exclude the Acts in certain cases where accommodation is shared. The cases draw a line between an "essential living room" and a bathroom or coal cellar the sharing of which does not matter. In *Paisner* v. *Goodrich*, *supra*, a spare bedroom was "shared," consecutively rather than concurrently. Denning L.J. in a dissenting judgment stressed that while decisions on the interpretation of an Act were binding, the words used by the judges in giving the decisions were not. In every new case it was necessary to go back to the words of the statute. If the words of the judges led to a different result from the words of the statute, the latter should prevail. He thought that the rooms let exclusively to the tenant constituted a "separate dwelling" and the added right to share the spare bedroom did not affect the position. The majority however felt that the previous decisions bound them to hold that the sharing of a living room excluded the Acts, whether or not the part exclusively let comprised all the essentials of a dwelling house. Although it is always necessary to bear in mind that it is the words of an Act which are being construed, a line of cases may have established principles on which the court is to proceed in interpreting the Act, and these principles are then binding in subsequent cases. Thus the majority in *Paisner* v. *Goodrich* held reluctantly that the "living room" test was too firmly established to be upset.

The Court of Appeal in *Woods* v. *Wise* [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767, was faced at first sight with a choice between one interpretation of the word "premium" which might cause hardship in the individual case and another which might allow evasion in other less meritorious cases. The landlord had charged less than the standard rent. The balance was made up by a lump sum payment, discount being allowed for payment in advance. The tenant claimed that this lump sum was a "premium," recoverable as such. The landlord said it was "commuted rent" and had been so treated in all the negotiations. To have allowed the tenant to succeed would have caused great hardship to the landlord, who received in all no more than she was entitled to. But all premiums are in a sense commuted or capitalised rent and to have held that the sum in question was not a premium might have opened the door to fresh devices by which landlords could extract more than the Acts intended them to have. In the end the court was able to avoid the issue ("evade" would be too strong a word). The arrangement had, it seems, been made to suit the convenience of the tenant rather than the landlord. Accordingly it was held that the tenant had failed to prove that the

landlord had "required" the premium, if such it was, as a condition of the grant of the lease.

JOHN MONTGOMERIE.

The McNaghten Rules

In an earlier note in this *Review* (Vol. 17, p. 383) I expressed my astonishment at the support given to the proposition that the reference in the rule, generally known as the McNaghten rule, to "wrong" was to morality and not to legality. That proposition, it was averred by Dr. Morris, was laid down by the High Court of Australia in *Stapleton* v. *The Queen* (1952) 86 C.L.R. 358: I was foolhardy enough to dissent before I had read the report of the case. I have now read the case. It is clear, as Dr. Morris averred, that the High Court says that the McNaghten rules mean by knowledge of "wrong" knowledge that the act was contrary to morals. I must, however, respectfully affirm my dissent from this interpretation.

The actual examination given by the High Court to the interpretation of the judges' answers to the questions put by the Lords is contained in a narrow compass. It was maintained first as a general proposition that the judges were not purporting to lay down any new tests in their answers, but were merely formulating the existing law. The traditional test, the one elaborated in the earlier cases, was that of "capacity to distinguish right and wrong": a purely "moral" test. The references in the judges' answers to the accused's knowledge that he was acting "contrary to law" arise not from their statement of the legal test of insanity, but from their repetition of phrases used in the questions put to them. Those questions, of course, have no authority. Here, however, is the entire argument on this question of interpretation of the rules. I have added lettering myself in order to facilitate subsequent reference to the individual propositions. "(a) The first question put to the judges relates to the effect of what at that time were often described as partial delusions. (b) The question itself required the assumption that 'the accused knew he was acting contrary to law.' (c) The phrase is taken up in the answer, and doubtless it is for that reason that the view arose that capacity to know the unlawfulness of the act was the test. (d) But if the answer to the second and third questions is examined it will be seen that this cannot be so. (e) The careful limitations imposed by the judges in the first answer show that they are not laying down a general proposition, (f) as they do in answer to the second and third questions, but are dealing with the particular hypothesis formulated." Before I analyse this statement I have to say that I accept the contention that if the wording of the McNaghten rules is an inadequate guide to the meaning the judges intended to

convey, then it is proper even now to examine the earlier case law as a further guide to the intention. It is true that there is abundant authority for treating the McNaghten rules as independent of earlier authority, as if they were a new code of the law of insanity. But courts have always assumed that they were applying the McNaghten rules, and not some misinterpretation of the rules. I would be prepared, moreover, to say that in reading the McNaghten rules one should *ab initio* have the earlier case law in mind. Even so, I think the McNaghten rules refer to legality. But, of course, this latter contention cannot be pursued without an examination of the earlier case law, and the extract from *Stapleton*, and this note, are concerned with the wording of the McNaghten rules.

There is a general comment to be made. The High Court points out in proposition (a) that the first question refers to partial delusions. But, in fact, all the questions were concerned with the effect of partial delusions, there being specific references to them in the second and fourth questions. Perhaps the lynch pin of the High Court's argument is in proposition (b), to the effect that the first question required the assumption that "the accused knew he was acting contrary to the law." But the first question requires no such general assumption. The specific question asked is "What is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect of one or more particular subjects or persons. . . .?" The questioner adds an example of the circumstances described in the question, prefixing the example with the words "as, for instance, . . ." It is in this illustrative addition to the question that the words appear "knew he was acting contrary to law." The contention of the High Court is that the phrase "contrary to the law of the land," which appears in the first answer, is there because the judges were merely dealing with the "particular hypothesis" put in the question (see (f)) of a man who knew that he was acting contrary to the law of the land. It is asserted that the words are "careful limitations" (see (e)) confining the answer to the instance given in the question. This opinion that the answer is a "careful limitation" to a "particular hypothesis" is surely not in accordance with the terms of the answer. The judges are certainly "careful" to limit their answer to a "hypothesis" contained in the question, but this is the hypothesis of "those who labour under such [1] partial delusions and are not in other respects insane." They refer to the kinds of delusions detailed in the example in the question, *viz.*, "redressing or revenging some supposed injury, or producing some public benefit," but these must surely be instances only of the general

[1] The word "such" is sufficiently explained by the fact that "such partial delusions" is an abbreviation for "insane delusion in respect of one or more particular subjects or persons."

principle which is being stated. The answer is a general one—that a person labouring under partial delusions is punishable if he knew that he was acting contrary to the law of the land. The judges are not saying that if a person who suffers from partial delusions knows that his act is contrary to law then he is punishable if he knows his act is contrary to the law! In any case, the words "limitation" and "particular" are inappropriate when applied to the characteristic of knowing that an act is contrary to the law. That characteristic is a *general* criterion of liability.

Though the High Court alleges that an examination of the answer to the second and third questions will show that capacity to know unlawfulness cannot be the test, they do not indicate what it is in the answer that shows this. Incidentally, the statement in the first answer, and the "hypothesis" of the next answer, refers not to "*capacity* to know the unlawfulness of the act," but to actual knowledge of illegality. The answers to the second and third questions explain why in earlier cases the question left to the jury was framed abstractly in terms of "the difference between right and wrong," and why this mode is consistent with the test of legality, and, indeed, presupposes it. The judges say expressly that this mode was employed, instead of referring to the law of the land, in order not "to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction." But, say the judges, proof of actual knowledge is not essential since it may be presumed. The answer indicates clearly that actual knowledge of the law of the land is *sufficient* for liability. It is not essential because a presumed knowledge suffices. It is only with regard to such presumed knowledge that the test of morality appears. Presumed knowledge exists where the party was "conscious that the act was one which he ought not to do."

In conclusion, I repeat what I said in my previous note, that I do not applaud a defence of insanity which excludes from its ambit persons who are aware of the illegality of their acts. I merely dissent from the interpretation placed on the McNaghten rules by *Stapleton* v. *The Queen*.

J. L. Montrose.

Maintaining an "Enemy" Wife

As Sellers J. observed in *Bevan* v. *Bevan* [1] the question of the effect of the outbreak of war on payments of maintenance under a separation agreement appears hitherto not to have come before the courts, although perforce many such agreements subsisted during both world wars. This fact in itself is an indication that the problem before the court was more apparent than real. Yet the

[1] [1955] 2 W.L.R. 948; [1955] 2 All E.R. 206.

decision does raise in a neat form many of the problems engendered by wartime conditions; and all this ten years after the cessation of hostilities!

The facts in *Bevan* v. *Bevan* were as follows:

> In 1932 a separation agreement was entered into by the parties whereby the husband agreed, *inter alia*, to pay to the wife during their joint lives the monthly sum of £9, "such payments to be made to her on the first day of each month through the National Provincial Bank, Ltd., at Hastings or such other bank as the husband may select." Until June 1939 the husband continued to pay the requisite amount, but since that date had made no payments, although in 1951 he had been instructed by the Custodian of Enemy Property to hold all sums owing to the wife free from the Trading with the Enemy legislative restrictions.[2] On September 3, 1939 the wife was residing in Vienna, having recently arrived there from Brazil. Austria ceased to be enemy territory as from November 5, 1952 and in the following April the wife commenced proceedings, claiming arrears of maintenance from June 1939.

Sellers J., in finding for the wife, held that principles of public policy did not require that this contract should terminate on the outbreak of war and for this he relied strongly on passages from Lord Porter's judgment in *Sovfracht V/O* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)*,[3] the same learned Law Lord in *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag*[4] and Lord Morton in *Arab Bank Ltd.* v. *Barclays Bank*.[5] It is not proposed to examine here the application of these decisions to the instant case but to consider some general aspects of the problem.

It appears from the recital of the facts in the judgment[6] that the plaintiff did not contend that the contract was an executed one but that in fact the parties accepted that it was executory. The predetermination by the parties of this point led to Sellers J. eschewing what is considered to be the vital issue in the case. The distinction between executory and executed contracts has been considered in many of the cases on the subject[7] and has noticeably been avoided in others. As is pointed out in McNair's *Legal Effects of War*,[8] the words themselves are of no great help and are often misleading in determining the effect of war on different kinds

[2] Under s. 7 (1) (*a*) of the Trading with the Enemy Act, 1939, payments may be required to be made to the Custodian which would, "but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy . . ." See further, footnote 13 *infra*.

[3] [1943] A.C. 203 at p. 251.

[4] [1946] A.C. 219 at p. 258.

[5] [1954] A.C. 495 at p. 523.

[6] At p. 951 (W.L.R.); at p. 208 (All E.R.).

[7] See *e.g.*, Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* [1918] A.C. 260 at p. 267.

[8] At p. 93.

of contracts; substantially, however, an executed contract means a contract not necessitating any intercourse (not necessarily commercial)[9] with the enemy during the war and this particularly would include accrued rights. The effect of war generally is to abrogate or destroy any subsisting right to further performance other than the right to payment of a liquidated sum of money which will be treated as a debt and will survive the outbreak of war.[10] In *Schering's* case—where the contract was held not to have been abrogated—nothing remained to be done under the contract but to discharge an accrued debt by instalments. Similarly, in *Bevan* v. *Bevan* the payment of maintenance was an accrued debt[11] payable by instalments, unilateral in performance and requiring no intercourse with the enemy. The husband's duty under the contract was to make the payments to an English branch of an English bank, thus creating no need for any communication between the spouses. In these circumstances could it be said that the contract "cut across the line of war?"[12]

It is useful and instructive to illustrate by a hypothetical case the tenuousness of the husband's contentions as to abrogation. A in 1937 leases property to B for fourteen years at a rental of £x a year. In 1939 before hostilities commenced A goes to Vienna. Is the outbreak of war such an event as to abrogate the contract of lease and absolve B from paying the rent? It is submitted that the reverse would be the case, particularly since section 7 of the Trading with the Enemy Act, 1939, specifically provides for such a situation.[13] Any abrogation of the lease would make B a trespasser in circumstances in which A could not obtain possession.

As indicated the decision raises substantial questions as to the effect of the war on a separation agreement. The continued presence of the agreement may or may not prevent desertion

[9] See Lord Dunedin in the *Ertel Bieber* case at p. 267–8 cited by Lord Morton in the *Arab Bank* case at p. 523; the latter passage was quoted by Sellers J. at p. 952.

[10] McNair, *op. cit.* p. 93 and Lord Thankerton in the *Schering* case at p. 240.

[11] The debt although for an indefinite period, *i.e.* joint lives, was for a fixed amount.

[12] It is further submitted that the mutual obligations to live separate and apart do not affect the issue. As Sellers J. remarked: "There was nothing actively to be done by the wife . . .", and he went on to say that the obligations to live separate and apart required no intercourse; he did, however, add that it might be said that the wife had a duty to communicate to her husband for the purpose of forwarding the monthly maintenance, any change of address in Vienna which she had given him before the war, or possibly to give a receipt for moneys received. None of these actions, however, was necessary to ensure the husband completing his obligation.

Even were it to be contended that the contract was executory, could it not be asserted that the contract was severable? See, McNair, *op. cit.* p. 93.

[13] See footnote 2 *supra*. In *Bevan* v. *Bevan* the husband had been instructed to pay the amounts to the Custodian in accordance with the provisions of s. 7 (1) (*a*) of the Act; by s. 7 (2) he would not be liable to any action or legal proceeding "by reason only of such compliance." This would preclude the wife from claiming even if she received no payments, although as Sellers J. observed ". . . the wife could have some hope of retrieving them in time."

running.[14] Furthermore, the wife's right to maintenance outside the terms of the agreement may come into play.[15]

Finally, the application of the cessation of enemy status coupled with the effect of the provisions of the Limitation (Enemy and War Prisoners) Act, 1945, will bar any remedy available to a large number of prospective plaintiffs. Section 1 (1) of the Act provides for a suspension of the period of limitation where a party was an enemy or was detained in enemy territory. The period of limitation "will in no case expire before the end of twelve months from the date when he ceased to be an enemy or be so detained." Clearly, the removal of enemy status will apply to both conditions, but where enemy status remains are the conditions cumulative or non-cumulative? Could an "enemy" plaintiff who was not "so detained" be met with a successful plea of the limitation rule?[16] In *Bevan* v. *Bevan* the point did not appear to have been pleaded.

Despite the unrealities of the particular problem in *Bevan* v. *Bevan*, the above remarks may have indicated that the general problem of contracts affected in one way or another by the outbreak of war is a long way from becoming settled law.

L. J. Blom-Cooper.

Two "Interesting" Cases of Evidence

The cases of *Cartwright* v. *W. Richardson & Co. Ltd.* [1955] 1 W.L.R. 340; 1 All E.R. 742, and *Galler* v. *Galler* [1955] 1 W.L.R. 400; 1 All E.R. 792, would certainly not have been reported but for the importance of the point of evidence that arose in both of

[14] If the agreement is abrogated desertion may revive. Even if there is no abrogation questions of repudiation can arise.

[15] If the agreement is abrogated or becomes unenforceable the wife will seek to obtain maintenance under s. 23 of the Matrimonial Causes Act, 1950. Since the wife in *Bevan* retained her English domicile the jurisdictional problem does not arise. The substantial issue would be whether she could claim maintenance to operate retroactively. In *McLellan* v. *McLellan* [1953] P. 138 Karminski J., in holding that periodical payments ran from the date of the issue of the summons, said (at p. 140): "I think the section is intended to leave the matter of the date very largely in the hands of the court and to leave a fairly wide discretion." In view of the inability due to war to issue a summons, it appears the wife would be successful.

[16] It seems that an enemy plaintiff who is physically present within the jurisdiction *may* maintain an action. Any sum recoverable must be paid to the Custodian of Enemy Property for the purpose of ensuring that it does not pass into the hand of an enemy: *Schaffenius* v. *Goldberg* [1916] 1 K.B. 284, and *Weiner* v. *Central Fund for German Jewry* [1941] 2 All E.R. 29. See s. 7 (2) of the Trading with the Enemy Act, 1939. And see footnote 13 *supra*. The 1945 Act was passed with a view to post-hostility conditions. Its aim was to continue until the handing over to an administrator the control of funds destined for enemy persons and at the same time to prevent limitation periods from running during hostilities without extending the time lag in the institution of proceedings in circumstances in which a plaintiff would be physically able to sue. See also *Janson* v. *Driefontein Consolidated Mines, Ltd.* [1902] A.C. 484; and Dicey, *Conflict of Laws* (6th ed.), exception to Rule 23 at p. 162, and especially n. 9.

them—a point that if successfully taken will frequently settle the issue before the court.

In the first case the plaintiff claimed damages from his employers for personal injuries suffered in the course of his employment as a result of an accident witnessed by J., a fellow employee. Whilst employed by the defendants J. made a statement of the circumstances in which the accident occurred. Shortly before the hearing of the action, J., who was then no longer employed by the defendants, signed this statement, but when called to give evidence on behalf of the defendants it would appear, though this is not expressly stated in the report, that he gave a different version. Counsel for the defendants applied for leave to put the previous statement to him in the box. Counsel for the plaintiff opposed the application on two grounds, *viz.*,

(a) that at the time when the statement was made J. was employed by the defendants and was therefore "a person interested" within the provisions of section 1 (3) of the Evidence Act, 1938, and

(b) that since J. had not shown himself hostile to the party calling him his evidence could not be contradicted by the written statement: section 3, Criminal Procedure Act, 1865.

Section 1 (1) of the Act of 1938 provides:—

> "In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact. . . ."

This provision is extremely wide, but there is a rule of evidence much older than the Act of 1938 to the effect that previously made statements may not be put to a witness for the purpose of shaking the faith of the court in his evidence unless the witness proves "hostile" or "adverse": see section 3, Criminal Procedure Act, 1865, which applies to civil procedure also.

It is well settled that the meaning of the words "hostile" or "adverse" when used in this context is that the witness by his demeanour in giving evidence shows either that he is not telling the truth or is in some other way intentionally misleading the court as to the truth of facts he is called upon to establish. Counsel for the party calling that witness may not put previous statements to him merely because he does not "come up to his proof": the judge must also be satisfied that the witness is showing a hostile mind to that party: *Greenough* v. *Eccles* (1859) 5 C.B.(N.S.) 786.

Barry J., being of the opinion that J. could not be regarded as a hostile or adverse witness, held that the Evidence Act was not intended to overrule the ordinary rules of procedure applicable in the trial of civil actions.

> "It was not a proper use of the provisions of the Act to introduce a written statement for the sole purpose of showing

that on an earlier occasion the witness had given a different account and of shattering the faith of the court in the evidence given by him in the witness box."

In view of the provisions of the Act of 1865 and the common law of evidence before the Act, it is submitted that Barry J.'s decision cannot really be challenged on this point.

The learned judge refused to admit the statement on the further point that J. was " a person interested " within section 1 (3) of the Evidence Act, 1938, which provides:—

> " Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

There is ample authority in the judgment of Asquith L.J. (with which Scott L.J. in the same case agreed) in *Barkway* v. *South Wales Transport Co.* [1949] 1 K.B. 54 (for a more detailed report of the judgments see [1948] 2 All E.R. 473) and Morton J. (as he then was) in *Plomein, etc.* v. *The National Marketing Co.* [1941] Ch. 248 to support Barry J.'s finding that being an employee at the time when he made the statement J. was " a person interested." However, the test to be satisfied in the subsection is a twofold one: see *Jarman* v. *Lambert & Cook* [1951] 2 K.B. 937. The statement must be made (a) by " a person interested " and (b) at a time when the proceedings were " pending or anticipated."

It seems now well established that proceedings will be deemed to be pending if the statement was made at any time between the issue of the writ and the hearing: *Bain* v. *Moss Hutchison Line* [1949] 1 K.B. 51 and *Barkway's* case, *supra*. Moreover, to be " anticipated " proceedings must be " regarded as likely " or " reasonably probable " or " likely ": see the judgments of Sir Raymond Evershed M.R. and Hodson L.J. in *Jarman's* case, *supra*.

Unfortunately, the reader of both reports of the case is left to speculate whether the facts before the learned judge did satisfy him that in addition to J. being " a person interested " the statement was made at a time when proceedings were, if not " pending " at least " anticipated."

In the second case, heard before Barnard, J., the only point in issue was whether the person whose statement it was sought to adduce was " a person interested " within section 1 (3) of the Act of 1938, it being quite clear that at the time the statement in question was made proceedings were " pending " or " anticipated."

This was a wife's contested petition for divorce. The wife alleged that the husband had been guilty of impropriety with a nursemaid who had, some time prior to the hearing of the petition, since returned to Denmark. The husband's solicitors sent a

questionnaire to the nursemaid and the answers she returned repudiated all the charges made by the wife. On counsel for the husband seeking to put the questionnaire and its answers in evidence, counsel for the wife raised an objection that at the time the answers were returned the nursemaid was "a person interested." He sought to distinguish an earlier decision of Barnard J. in *Holton* v. *Holton* [1946] 2 All E.R. 534, where counsel, seeking to adduce a statement made by the petitioner's mother, successfully argued that the interest referred to in the subsection was an interest in the material sense, *i.e.*, a material interest as opposed to an interest in the sentimental or intellectual sense. In this earlier case Barnard J. had admitted the statement, giving, however, no reason for doing so. Counsel for the wife in the instant case argued that for the maker of a statement to be charged with misconducting herself with a married man, the respondent, should suffice to make her materially interested and render her statement inadmissible. As in *Holton's* case, Barnard J. admitted the statement without giving any reasons for doing so, saying, however, "a great deal of importance could not be attached to it."

It is submitted that the nature of the interest referred to in section 1 (3) of the Act of 1938 should not be confined to a material or financial or pecuniary interest but should broadly include all those people who at the time when the statement is made are, by virtue of the circumstances, likely to have their recollection of the facts they are evidencing influenced in favour of one party or the other. This is clearly a difficult problem for the court to decide, but I do not think clearer guidance has been given since Morton J. in *Plomein's* case, *supra*, said that to be outside the section the person making the statement should be "independent." Common sense should tell us that the nursemaid in *Galler's* case would be influenced in her testimony and, moreover, she clearly does not satisfy the test of being "independent." Applying this test, moreover, to *Cartwright's* case, it is hard to see how an employee in such a lowly position as was J. could be interested, except on very specious reasoning, in the result of the proceedings: see *Friend* v. *Wallman* [1946] 2 All E.R. 23; he was certainly more independent from the point of view of the value of his evidence than the nursemaid.

However, in view of the fact that an absolute discretion as to whether or not he shall admit a statement is only given to the judge when he sits with a jury—see section 1 (5) of the Act of 1938—perhaps it is beneficial that he should be able to exercise some discretion on statements falling within the words of subsection 3.

K. A. L. Scroggs.

Loss of Consortium

The High Court of Australia has held in *Toohey* v. *Hollier* ((1955) The Argus L.R. 302) that a husband may recover for loss he has suffered owing to bodily injuries to his wife even though that loss does not take the form of a total deprivation of consortium. In a unanimous opinion (Dixon C.J., McTiernan J., and Kitto J.) the High Court was able, by applying some common sense and a knowledge of legal history, to reject the mathematics of an indivisible juristic concept which seemed to be the outcome of the dicta of Lords Goddard and Porter in the House of Lords, and of Birkett, Cohen and Asquith L.JJ., in the Court of Appeal, in *Best* v. *Samuel Fox & Co., Ltd.* ([1952] A.C. 716, at pp. 733, 728; [1951] 2 K.B. 639 at pp. 665, 669). The fog created in judicial minds by the proposition that "*consortium* is indivisible" will, it is hoped, now be dispelled. The fog affected the N.S.W. Supreme Court in *Smee* v. *Tibbetts* ([1953] S.R.(N.S.W.) 39) and the Canadian Supreme Court in *Montreal Tramways Co.* v. *McGuire* ([1954] 1 D.L.R. 583).

The plaintiffs, husband and wife, brought action in the Supreme Court of Western Australia for injuries sustained by the wife in a motor-vehicle accident. At the trial before Wolff J. judgment was entered in favour of the wife for £3,520, and in favour of the husband for £568 in respect of expenses which he had incurred in consequence of the wife's injury and for a further sum of £1,000. The defendant appealed to the High Court against the award of £1,000 to the husband. The injuries suffered by the wife were severe. After a period in hospital and a period of convalescence she returned home, but was unable immediately to perform any household duties. For thirty-seven weeks the husband employed a housekeeper. At the time of the trial he was doing much of the housework himself and there was little prospect that the wife would ever be able again to perform household duties to the extent she had done before the accident.

The principal submission of defendant's counsel on the appeal was that no damages are recoverable for a partial deprivation of consortium. So far therefore as the trial judge had awarded damages in respect of any time during which the wife had lived or would live with her husband those damages were wrongly awarded. Counsel also submitted that in awarding the £1,000 the trial judge must have taken account of non-material loss suffered by the plaintiff. This latter submission was rejected by the High Court following a close perusal of the judgment of the trial judge. The High Court then considered and rejected the submission that "*consortium* is indivisible." After politely mentioning that there may have been occasion in *Best* v. *Samuel Fox & Co.*, to indulge

> "a discussion of a rather abstract kind as to whether *consortium* between husband and wife is, in the somewhat

philosophical if not theological phrase of Lord Asquith, one and indiscerptible,"

(at p. 305), the court continued:

> "The cause of action upon which the male plaintiff sued is very familiar and but for the ill-fated experiment of Mrs. Julia Best the common practice would probably have gone unquestioned by which the practical domestic disadvantages suffered by a husband in consequence of his wife's impaired health or bodily condition are left as matters to be considered by the tribunal of fact in assessing damages. For our part we think that a great deal of misconception has arisen through an assumption that the loss or damage to the husband made the gist of the action at common law was of a specific technical description. For historical reasons which are not material bodily injury to a wife negligently or intentionally inflicted by a stranger exposed him to an action of trespass not only at the wife's suit, a suit in which of course her husband necessarily joined, but at the suit of the husband alone. The husband's suit, however, could not be maintained simply upon the trespass to the wife's person. In the husband's suit special damage to him formed the gist of the action, notwithstanding that it was an action of trespass and not case. Of course the special damage must be a reasonable or immediate consequence of the trespass but we do not think that there is any ground for the supposition that it was restricted to particular categories or by any specific formula. Matters of sentiment or feeling were doubtless not regarded but that is because speaking generally special damage is not made out except by some actual temporal loss, the deprivation of some material temporal advantage capable of estimation in money, not because such matters do not conform with some special description recognised by law as an incident of marriage for the loss of which a cause of action is given."

(at pp. 305 and 306). The court then made reference to the history of the word "consortium," expressing the view that it never possessed or acquired a legal meaning. The court then continued:

> "It is difficult to believe that if a husband proved a definite and substantial detriment to himself because of his wife's injuries his action would fail because it fell short of an interruption of the entire comfort, society and fellowship. Again take the case of a tradesman's wife accustomed to assist in the conduct of her husband's business but disabled from doing so by a stranger's wrongful act. It is impossible to resist the impression that in an action by the husband it would be regarded as a matter of course to award him damages in respect of consequential loss or expense incurred by him in the conduct of his business."

(at p. 306). Lord Reid's view expressed in *Best* v. *Samuel Fox &*

Co. ([1952] A.C. 716 at p. 736), was called in aid. Lord Reid had said:

> 'I do not think that it is open to doubt that an impairment of a wife's capacity to render assistance to her husband was enough to found an action."

The court drew an analogy with the master's action for loss resulting from bodily harm to his servant. In such a case it was enough that the injury to the servant rendered him less capable of performing his master's work.

The submission made by defendant's counsel could not then be supported. The court said:

> "In the present case the male plaintiff has suffered and will continue to suffer a very substantial prejudice or disadvantage of a material or practical kind because of the greatly reduced capacity of his wife to perform the domestic duties, manage the household affairs and give him her support and assistance. Why should this not form a proper head of consequential damage to him? The answer given by the appellant was that it is all a part of *consortium* and *consortium* is one and indiscerptible. Unless you lose it all you have no remedy. We venture to think that such an answer proceeds from a supposition which finds no justification either in the history of the cause of action or in the common law principles by which it is governed, a supposition that the husband's remedy in damages is only for the violation of a right which the law gives him to the *consortium* of his wife and further that there is no actionable breach of the duty to respect the right except by the commission of an act completely depriving the husband of her *consortium*. The common law took no such abstract and theoretical position."

Some reference was made at the end of the judgment to American law. The High Court quoted from the judgments of Barclay J. in *Furnish* v. *Missouri Pacific Ry. Co.* ((1890) 102 Mo. 669) and McClellan C.J. in *Birmingham Southern Ry. Co.* v. *Lintner* ((1904) 141 Ala. 420) and justified reference to older cases by saying:

> "Just as in England so in the United States a modern tendency has grown of treating *consortium* as a technical conception providing the subject-matter of the husband's right and of an actionable wrong consisting in its invasion. Juridically this may seem more satisfying and it might be open to little objection if the notion of *consortium* were itself derived from the actual course of the common law so that the word served but as a compendious and perhaps convenient label for the rights of the husband as ascertained from the true scope of his remedy. But the contention of the appellant seems to treat it simply as an abstract and somewhat metaphysical conception the content of which is ascertained by *a priori* reasoning and when so ascertained affords the exclusive measure of the entire right of the husband and of his remedy. Perhaps the

use of the conception or of the word in the law of desertion may contribute to the tendency. However this may be it is not the manner in which the common law dealt with a cause of action upon which a husband sued for the consequential special damage occasioned to him by a wrongful act causing bodily injury to his wife."

Judges and jurists have now for some time been chorusing condemnations of the husband's action in situations such as *Toohey* v. *Hollier*. Perhaps the High Court's judgment will serve to restore some understanding of the action and of how far the condemnation is warranted. It should not be forgotten that the housewife who is injured does not recover any damages for diminished earning capacity. A crippled housewife whose husband dies may fairly ask why she was unable to recover damages in her action so as to give her the subsistence which now her crippled condition prevents her from earning. So long as the housewife is not allowed to recover it is surely not improper that the husband should have an action for the material loss to the home which has resulted from her injuries. And if the courts come to allow the housewife to recover for diminished earning capacity, it may still be proper to retain the husband's action by distinguishing, as does the *Restatement* (para. 693), between the value of her earning capacity outside the home, for which she may recover, and the value of her services in the home, for which he may recover. Judicial development of the law is inhibited by the assumption that the true head of damages is "loss of wages," and not, as is generally recognised in America, "loss of earning capacity" (see the writer's article in (1955) 28 Aust. L.J. 563, at pp. 571–2.) Some American states have made express statutory provisions. (Jacobs and Goebel, *Cases and Materials on Domestic Relations*, third ed., 578–9. The American cases are noted on pp. 565–589. See also Prosser, *Handbook of the Law of Tort*, 938–43).

It may fairly be inferred from the judgment of the trial judge that some of the £1,000 awarded to the husband was intended to provide for prospective medical expenses. The High Court made no reference to this in its judgment, although the Chief Justice, during argument, expressed the view that the husband's right to recover for such prospective expenses flowed from his common law duty to provide necessaries for his wife. But is it proper that the husband should recover for prospective medical expenses? He might dispose of the money otherwise than in providing medical treatment. He might die or divorce the wife and the obligation to pay for medical treatment falls on the wife herself as well as on the husband. The *Restatement* (para. 693), it is true, contemplates recovery by the husband for prospective expenses, but some American courts insist that such recovery belongs to the wife (Prosser, at p. 941).

Ross Parsons.

NOTE: Professor KAHN-FREUND will be abroad during the whole of the academic year beginning in October, 1955. Letters relating to the *Modern Law Review* which might otherwise have been addressed to him should therefore be addressed to the General Editor.

REVIEWS

EXECUTIVE DISCRETION AND JUDICIAL CONTROL. Hamlyn Lectures, Sixth Series. By C. J. HAMSON, M.A., LL.M. [Stevens & Sons. 1954. 222 pp. 12s. 6d.]

THIS book, better described by its sub-title "An Aspect of the Conseil d'Etat," is as exciting as it is informative. To anyone concerned with the mess of administrative tribunals and the far more serious problem presented by the usually unfettered discretion accorded Ministers in numerous Acts, it is a joy to read that the Senior Commissaire du Gouvernement, on learning of the decision in *Liversidge* v. *Anderson,* suggested that Professor Hamson must have explained himself amiss "for the proposition . . . was one which in his opinion must be unacceptable in a civilised country and which was more than strange in a country which after all had invented the term 'the rule of law'." (p. 14).

Clearly if Defence Regulation 18B were operative in France, the Minister's act would have been subject to the verification of fact (in this case "hostile origin and associations") and if the facts were verified, to an assessment as to whether the Minister was *justified* in taking the action. Those phrases which cause us in this country so much heart-burning "if the Minister is satisfied" or "if it appears to the Minister" and which have caused the English courts to abdicate their traditional position, would have led the Conseil d'Etat to have carried out an exhaustive inquiry. Quoting again its same senior member, "if a Minister is to be satisfied, he must *as Minister* have reasonable grounds upon which his satisfaction is based; and having such grounds he is automatically under duty to disclose them to the competent court should that court so require" (p. 15). How logical, how sensible, how eminently satisfactory!

There is more than this, however, for no administrative action of the Minister, nor of his servants, is beyond the competency of the use by the plaintiff of the recours en annulation, whether that act is "judicial, executive, legislative or quasi any of them." Furthermore, it is the Court of Appeal from all administrative tribunals with the exception of three dealing with War Claims, Pensions Appeals and Industrial Disputes. Thus, this remarkable court, the Conseil d'Etat is able to survey and pass upon every action of any official, if it be challenged by the citizen, or to refer back any case from any type of tribunal.

It is, of course, the muddle in which we find ourselves and the self-imposed impotency of our courts, which lead to the stressing of this aspect of power set over against the administration. Yet in fact it is in virtue of its *co-operation* with the administration that the Conseil d'Etat statuant au contentieux draws its authority. An equally important, if not more important, part of the task of the Conseil is advising the administration in its work—the drafting of regulations and legislation, procedures to be adopted, and the solution of difficulties which occur in the course of administration. Whilst the advisory sections—the administrative sections—and the judicial sections mostly work separately, every week this body is reunited formally in Assemblée Générale, there to complete all the important business with the vital exception of its judicial business. Informally the meetings of individuals are occurring all the time, to the mutual advantage of everyone in the solving of difficult problems, and, most important of all, in fostering a corporate feeling which holds the body together.

But apart from their formal responsibilities which thus link the judicial sections to the administrative machine of the State in a unique way, the personnel of the Conseil d'Etat are practical administrators—but only the élite of the service achieve this select body and attain, as it were, Treasury status. Recruitment is at various ages—by competitive examination at the bottom with seniority promotion right to the top. At each stage a proportion of "outsiders" from the administrative service are brought in, and those inside are encouraged to go out into active administrative service, with the right to return. There is, thus, the intimate knowledge of the expert, and the detachment necessary for fair judgment.

Nor does the method of the Section du Contentieux frighten the administrator as does the method of the courts in this country with the production of files, the cross-examination of named individuals, who had better been anonymous, and the public condemnation of an individual who usually is doing no more than operate the machinery. Instead, arguments between the plaintiffs and the administration proceed in writing and are registered before the Section dealing with the case, which can call for any documents thought likely to be helpful—the documents being available only to both parties and the Section. A public session for the statement of final views may be held. Judgments, which are reasoned, are printed and published, and, if the plaintiff succeeds, then the action is declared illegal.

Professor Hamson describes this as a "dynamic court." It most certainly is, for it demands the administration's conformity to a standard of conduct which is not clearly defined. It is not enacted, nor formulated, nor is conformity to it enjoined by any legislation. The standard demanded in any case is what the Conseil d'Etat, in its "search for perfection," decides it shall be. Whilst precedents of relevant cases may guide, they do not constrain, and the court may refer to any source which it deems appropriate. Thus in one case it applied the principles enunciated in the Declaration of the Rights of Man, in another the conventions of the constitution. Yet the action condemned is declared "illegal" and the *status quo ante* has to be restored.

It is not necessary to stress the contrast with our own system—*Liversidge* v. *Anderson*; in *Re The Point of Ayr Colliery*; *Franklin* v. *Ministry of Town and Country planning*; *Woollett* v. *Minister of Agriculture*; these are but milestones along a route which it is depressing to trace, leading to Ministerial discretion unfettered by the *possibility* of legal redress. Crichel Down was in a somewhat different category. Here whilst constitutionally a Minister was at fault and a Minister resigned, the administrative as well as the political process had failed. The Woods Committee made a very pertinent comment "in present times the interests of private citizens are affected to a great extent by the actions of Civil Servants." The Permanent Secretary to the Treasury commenting on this report stressed "the need for constant vigilance to ensure respect for the rights and feelings of individual members of the public." He might well do so, for there is no possibility of legal redress in these cases. How different had this case happened across the Channel!

What then for the future? Professor Hamson is content to make two main points—that the powers of the High Court could be extended to cover all inferior tribunals but even then he doubts whether their powers would be as wide as the Conseil d'Etat in the parallel recours en cassation. On the other count—recours en annulation—he cannot conceive that the High Court would be *able,* even if it were willing, to deal with the illegality of administrative acts which did not conform to a dynamic standard. Here he looks to the executive itself setting up such a body.

Undoubtedly he is correct in this, and a tremendous step forward it would be. But is it not also desirable to give such a body appellate functions over administrative tribunals? This the author would object to as introducing "a

duality into our jurisdiction." Why not if it is the more effective control even if it meant also the introduction of a Tribunal des Conflits? The disease is so serious that a major operation is necessary.

Then, may a student of politics ask why it is that so much time is spent confounding Dicey? Dicey crippled the Donoughmore Committee. Dicey as an exercise for students is one thing, but Dicey as a Blackstone to be referred to on all occasions seems rather out-dated. One can but wish that another Bentham might appear and finally lay this ghost.

In this small volume Professor Hamson deals with the development of the Conseil d'Etat statuant au contentieux, its composition and procedure. He discusses its value and considers its appropriateness for the English scene. This is a stimulating book, packed with information and yet written in a very easy style. Students of politics, law and administration will be indebted to its author.

Henry Maddick.

Cases on the Law of Torts. By Cecil A. Wright, q.c. [Toronto: Butterworth & Co. (Canada) Ltd. 1954. xix and 905 pp. (with index). 50s. net in U.K.]

The appearance of a new casebook on Tort is an event of considerable interest. Probably in no other branch of the law is there so much room for controversy as to which cases ought to be included and how they ought to be arranged. This latest addition, compiled by the Dean of the Law School of Toronto University, makes no attempt to achieve a *via media*, which would more or less satisfy the greatest number of law teachers. Yet it is, perhaps, because of this that the casebook is stimulating, and even brilliant at times. It will certainly prove valuable to all those interested in tort, but the teacher of jurisprudence and the comparative lawyer are sure to approach it with an interest not usually associated with mere casebooks. Perhaps the reason is that this particular casebook is much more than a collection of cases; it is rather a casebook and textbook combined, and is, actually, used for teaching purposes in Canadian law schools. It includes over 250 reported cases, of which a considerable number are decisions of English courts; in fact, most of the more important English decisions will be found here. The rest is made up of Canadian decisions, which naturally predominate, of decisions of the United States courts and of the courts of the Dominions. There are also extracts from various statutes such as the Canadian Criminal Code, 1927, the Canadian Negligence Act, 1950, the Defamation Act, 1952, and from the American *Restatement*. There is one long extract in smaller print from an article in the Minn.L.Rev. (pp. 39–41). Each chapter is preceded by a short introduction drawing our attention to the main points involved. The cases in each chapter are divided into sections but, wisely, there are no headnotes to the cases. Frequently at the end of a case there are cross references, references to articles and observations distinguishing or comparing the solutions of other jurisdictions, or even posing problems that are likely to arise.

The author acknowledges his debt to the American tradition in general and to the work of Bohlen in particular. This is especially clear in two respects. First, in the structure of the book he adopts Wigmore's classification into torts of negligence, intention and strict liability which is, of course, also to be found in the *Restatement*. Secondly, he analyses the law of torts from the point of view of the interests affected. Here the influence of Pound and the American sociological school is evident. "The fundamental problem in the law of torts," writes the author, "(is) the weighing of various interests" (p. 694). He declares that "while all law has been described as a kind of social engineering, in no department does this become so apparent as

in the law of torts" (p. 5). The objects of the book are defined as "to provide material that would not only raise the most important problems of tortious liability but which could also serve as a basis for the study of the judicial process" (p. v). He also wishes to demonstrate the complexity of the law of torts as opposed to its textbook simplicity. "In a book of this kind," the author writes, "one can only present material to show what the courts do and what they say about what they have done" (p. 322). Thus, this is no mere collection of cases, it is "a sampling of judicial thought" (p. 9); in other words, it is a limited reproduction of judgments used as illustrations of the author's thesis. Its aim is "to supply the means of developing an understanding of principle in relation to facts and a facility of handling both in familiar situations" (p. v).

In a work which partakes of the character of a textbook, one is entitled to consider both its usefulness to the English law student and its general policy and character. Moreover, the forceful way in which the author brings out his point of view, leaves ample ground for disagreement and criticism. Yet it is the measure of the author's success that so much thought can be provoked by this casebook. Few in this country are likely to accept wholeheartedly the casebook method of teaching. A casebook cum textbook often conveys an impression of stability where only vagueness exists. The learned author avoids this, but the bewildering details and complications of the "judicial process," together with the use of extracts from cases as mere illustrations of the author's standpoint (*e.g., Donoghue* v. *Stevenson* appears twice, on p. 136 under s. 2 and on p. 288 under s. 6) presuppose considerable knowledge, which the student is not likely to possess, and which can only be acquired by the painful process of reading cases in the original. The author's arguments and queries, in many respects of outstanding quality, are far too advanced for the ordinary student as is the case for instance in Chapter IV. The reader is constantly directed to apply his mind to the points upon which the author bases his views, for example he writes: "An examination of the cases in this chapter should indicate . . . that the concept of 'nuisance' is much overworked, is of little assistance in deciding issues, and frequently is downright harmful" (pp. 520–1). Such a method, albeit stimulating to the teacher and scholar, does little to enhance the quality of independent criticism which, together with the ability to abstract the significant from the superfluous in case-law, are amongst the greatest benefits that the law student may derive from a University education.

If we now consider the tripartite classification of torts into torts of negligence, intention and strict liability, the principal objection is, of course, that it cuts across well-established torts such as nuisance, trespass to land, etc., which may be based either on intention, or negligence, or strict liability. However, where tradition clashes with logic, the author is against too much adherence to "historical formalism." Thus, he writes in the introduction: "To continue speaking of 'trespass to the person' is to use the language of medievalism and to obscure the search for principle" (p. 4). He would prefer to distinguish between "invasions to physical integrity intentionally caused and non-intentionally caused." He then goes on to analyse expressions which are commonly employed such as rights, wrongs, lawful and unlawful acts, in a Hohfeldian manner, but the analysis is too brief to be of great value. Some, perhaps, would not go as far as to criticise Lord Holt in *Ashby* v. *White* for ignoring the distinction between a privilege and a right, but the author himself recognises that "students of law . . . cannot expect an overnight discarding by the courts of language with which they have become familiar" (p. 9).

As regards the detailed accounts of the various topics, there is a particular insistence on negligence, which emphasises the importance that this subject has assumed in recent times. The tendency to shift liability from the notion of fault to the notion that compensation must fall on those who are better

able to bear it, is exceptionally well brought out. In criticising the judicial treatment of *res ipsa loquitur* he writes: "Under the guise of the maxim, courts are able to shift imperceptibly into forms of strict liability, while speaking the language of negligence" (p. 199). Perhaps not all readers will agree that "it is doubtful whether attempts to separate 'culpability' and 'compensation' lead to anything but confusion" (p. 132), but the argument is so compressed that it is hardly fair to criticise it. In a work in which there is so much useful material, it is, perhaps, invidious to single out cases which stand out. Yet one might be allowed to mention *Applebaum* v. *Gilchrist* [*1946*], a decision of the Ontario Court of Appeal on loss of consortium. On the other hand, it is to be regretted that no room was found for *Place* v. *Searle* and *Gray* v. *Gee*, or for the interesting judgment of the Court of Appeal in *King* v. *Phillips*. *Thomson* v. *Cremin* has now been reported in [1953] 2 All E.R. 1185. English lawyers will particularly welcome the report of the *Palsgraf* case and all the references to the American literature.

In conclusion, while this book cannot be unhesitatingly recommended to students because of its advanced and somewhat radical approach, teachers and scholars will undoubtedly find in it a work of real value and absorbing interest.

A. G. Chloros.

Personal Property. By J. Crossley Vaines, ll.m. of Gray's Inn and the Northern Circuit, Barrister-at-Law, Lecturer in Law in the University of Liverpool. [London: Butterworth & Co. (Publishers), Ltd. 1954. xliv and 292 and (Appendix) 58 and (index) 30 pp. 37s. 6d. net.]

Personal Property is an amorphous subject which straddles many branches of the law, so that one of the main difficulties in producing a book on it is the problem of selection. Mr. Vaines tells us in the Preface that he decided to exclude some of the more specialist branches of the subject such as patents, trade marks, copyright and insurance as well as company law. Within the limits the author has set the general plan of the book is attractive. The book is divided into five parts: Part I is called Nature of Personalty; Part II, Ownership and Possession; Part III, Transfer and Acquisition of Personal Property; Part IV, Giving or Loan of Personalty by way of Security; and Part V, Debtors and Creditors. Unfortunately one cannot but feel that some topics receive treatment quite disproportionate to their importance, while others equally important are omitted altogether or receive scant attention. Thus ten pages on the law of Intestate Succession (13–24) (under the heading Distinctions between Real and Personal Property) seem unnecessary, especially as much of it is a verbatim reproduction of statutory provisions repeated in the Appendix; so also eight pages (53–61) on applications under section 17 of the Married Women's Property Act, 1882, seem excessive, as do ten pages on Common Carriers (88–99). By contrast Liens and Finding are compressed into four pages each (106–10 and 234–7, respectively) while Assignment of Choses in Action is inadequately dealt with in ten (178–87). Moreover, a serious fault is the absence of any systematic account of the remedies of Trespass, Conversion and Detinue.

Though Mr. Vaines tells us he has written primarily for students it must be said that the book is not likely to be of real assistance to the general run of students. Far too often the law is stated rather than explained, and in a subject of this kind which demands of the student a background knowledge of Contract, Tort, Real Property and Equity, this is simply not helpful enough. Thus the bare statement "The assignment is subject to existing equities," followed by a brief account of *Roxburghe* v. *Cox* (1881) 17 Ch.D. 520 (p. 179) requires amplification. So does the verbatim citation of section 12 (1) of the

Sale of Goods Act, 1893, dealing with implied conditions as to title (p. 215. *Rowland* v. *Divall* [1923] 2 K.B. 500 needs at least a reference here). So also does the reference to section 11 (1) (*c*) of the Act on the same page. Again, is the *Strathcona Case* [1926] A.C. 108 adequately explained by saying "a ship is a peculiar chattel"? (p. 13).

There are also too many misleading statements as well as mistakes of substance in the text. To mention but a few: a pledgor of a chattel surely retains more than a chose in action. And the question *is* important even since 1875 for the mode of transfer depends on the right answer (p. 28). The view that a share is an equitable and not a legal chose cannot be accepted since *Re Rose* [1952] Ch. 499 (p. 30). It may be true that "you cannot have a limited *estate* in a personal thing" (p. 37) but you can have a determinable interest which looks very much the same thing to a student. (The whole section in which this sentence appears is bewildering in its failure to distinguish the law before and since 1926, and the position at law and in equity.) It is not clear that there is a presumption of advancement between a mother and her children (p. 50. See the cases cited in Nathan, *Equity*, at p. 112). It is not accurate to describe a finder as a bailee (pp. 62 and 72). If he were he would be guilty of larceny if he decided to misappropriate the thing long after the finding, which is not the law. *Commonwealth Trust* v. *Akotey* [1926] A.C. 72 can no longer be regarded as good law since it was expressly dissented from in *Mercantile Bank of India* v. *Central Bank of India* [1938] A.C. 287, yet the former appears in the text and the latter is relegated to a footnote (p. 118). It is by no means clear that an equitable chose cannot be assigned within L.P.A., 1925, s. 136 (1) (p. 180). *Re Rose* [1952] Ch. 499 is a serious omission at p. 198. *Re Apex Supply Co.* [1942] Ch. 108 and the proposition for which it is cited (p. 229, note (d)) were virtually overruled by *Cooden Engineering Co.* v. *Stanford* [1953] 1 Q.B. 86 and see now *Lamdon Trust* v. *Hurrel* [1955] 1 W.L.R. 391.

These are serious defects (and they are only a sample) and unfortunately they are not redeemed by the author's style. Though his method of presentation is on the whole attractive it often leaves much to be desired in the way of lucidity. Too often a sentence has to be read twice or three times before its meaning can be grasped. Moreover, the presentation of cases in the text is frequently done in footnote style and these make unattractive reading.

The book is also littered with minor slips and misprints. The names of no fewer than six judges are misspelt (Aitken L.J. at p. 53, Parde B. at p. 66, Lopez L.J. at p. 85, note (h), Delvin J., same page, note (g), Lord Denham at p. 118, note (c), and Somerville L.J. at p. 136). Sir Edward Coke never became a lord (pp. 25 and 266) though he is often referred to as Lord Coke by people who ought to know better.

In sum, unless and until Mr. Vaines performs some heroics in the next edition students will have to be warned to use this book only with the greatest caution.

P. S. Atiyah.

Snell's Principles of Equity. Twenty-fourth edition. By R. E. Megarry, M.A., LL.B., and P. V. Baker, M.A. B.C.L., of Lincoln's Inn, Barristers-at-Law. [London: Sweet & Maxwell, Ltd. cxix and 600 pp. and index. 45s. net.]

Snell's *Equity* has long been famous as a lucid, concise and accurate book on general equity. The 24th edition has retained its same general character and has fully maintained the high standards which have been built up by past editions.

In the preface to the previous edition (23rd) Mr. Megarry announced his intention of making the book more attractive academically. Development on

these lines was much needed, for Snell was in danger of falling between two stools. It was not entirely satisfactory as a student's book, for it passed too lightly over difficulties and avoided discussion of those controversies that make a law student's life interesting and make legal education something more than the learning of rules. And I imagine that it was too concise and short for practitioners who need to consult larger books on specialised subjects in equity. To cater for all types of reader in a book of reasonable size which purports to cover the whole of equity is a formidable task; and the text still provides very meagre discussion of some of the questions, which, to students and academic lawyers, are of the greatest interest and importance. (Instances are mentioned below.) The editors, however, have been able to point out where controversy exists and to provide, in footnotes, references to the cases and legal periodicals in which these questions are thrashed out. The book, from a student's point of view, then becomes one in which he can read a clear, short exposition of the rules and principles of Equity; and if he is sufficiently inquisitive, he can find his way to further material which will provide arguments and discussions of controversial issues. It is a combination of an introductory book and a reference book; it does not supply, nor does it pretend to supply, the discussions and explanations themselves.

Examples of the ways in which major problems are quickly dismissed can be found in many places. On page 90 the problem of the nature of trusts of imperfect obligation is dismissed in a few lines. The discussion on the requirement of public benefit in charitable trusts is squeezed into less than a page. A section on Tracing in Equity is given less than two pages. The recent controversy over the right of a married woman to remain in the matrimonial home after desertion is mentioned only by saying where the "weight of authority" lies. The question of trusts of the benefit of a contract receives only half a page. Snell is still a reference book rather than an explanatory book so far as controversies are concerned, but that is the only way to prevent it splitting its seams.

As foreshadowed in the preface to the previous edition, certain alterations have been made to the contents of the book. A book on equity is in danger of sucking into its covers detailed rules of branches of law in which equity plays only a small part. An attempt is made to keep strictly to the ground which is most conveniently covered by a book on general equity. Thus Mistake (apart from Rectification) has been omitted; much of the law of Vendor and Purchaser is omitted as being more relevant to Conveyancing; and the law of restrictive covenants has been greatly reduced. Apart from lingering thoughts about Mistake, these reductions are to be welcomed. The question of Mistake is a difficult one; for, subsequent to the threat in the preface to the 23rd edition to omit the subject in this one, the case of *Solle* v. *Butcher* [1950] 1 K.B. 671 has produced further grounds for arguing that the subject should be treated separately in equity. The equitable jurisdiction exercised in *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149 is relied on by Denning L.J. in *Solle* v. *Butcher*, and is one of great importance and possibility of development. There is at least more argument for including this aspect of mistake in this edition than in the previous ones. But it has been taken up in at least one of the leading student's books on *Contract* (Cheshire and Fifoot) and it is no doubt best to let it remain there.

I am tempted to offer observations on two points. In the first place, there seems to be some obscurity in the theory which is put forward as the basis of the enforcement of secret trusts. We are told on page 95 that "it is on the ground of not allowing the above statutory provisions to be used as an engine of fraud that secret trusts are enforced"; and that in the case of wills such trusts may be "fully secret" or "half-secret." But on page 99, on the authority of Danckwerts J. in *Re Young* [1951] Ch. 344, we are told that "the whole theory of secret trusts is that they operate outside the will." This theory, as I understand it, is that secret trusts are enforced because they are

not testamentary dispositions and therefore not within the provisions of the Wills Act. It is not then necessary to prove fraud in order to enforce them, and in *Re Young* itself, and in nearly all half-secret trust cases, there is no fraud. In spite of the dicta in *McCormick* v. *Grogan* (1869) L.R. 4 H.L. 82, it has never been satisfactory to rely on the doctrine of fraud as the basis of the enforcement of secret trusts. As explained above, trusts are enforced in the absence of fraud; and if fraud were the real basis of enforcement, its operation would be to prevent the fraudulent trustee getting the property, but it does not explain why the beneficiary takes it; the avoiding action taken against the trustee does not entitle us to conclude that a "person claiming land conveyed to another may therefore prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him" (p. 95). The fraud cannot be that of anyone other than the trustee because no one else has been fraudulent in these cases; it is no answer to say that the beneficiary is defrauded, because that is merely to say that the statute brings a result which equity does not like; that, however, is no reason to ignore the statute, unless someone's conscience is affected. There are indeed difficulties in any theory, and it may be that more than one theory has been relied on on different occasions and that the cases are not reconcilable on any single theory.

It is questionable whether the definition of a mortgage given by Lindley M.R. in *Santley* v. *Wilde* in 1899 is still suitable. A legal mortgage is defined on page 343 as "a transfer of a legal estate in land or other property as security for the repayment of a debt or the discharge of some other obligation." This definition no doubt deals adequately with the legal mortgage by demise or sub-demise but it is questionable whether it provides sufficiently for the charge by way of legal mortgage. A charge by way of legal mortgage is a legal charge and not a legal estate (Law of Property Act, 1925, s. 1); and it is more clearly described as the creation of a charge in favour of the mortgagee than as a transfer of a legal interest or charge to him. It is true of course that such a mortgage has the same effect as a mortgage by demise (Law of Property Act, 1925, s. 87; and note 85, p. 387). But it is thought that a definition which more clearly included both types of legal mortgage would be more easily understood by newcomers to the subject.

In short, the merits of Snell still remain. The defects from a student's point of view have to a large extent been cured by a greater emphasis on principle and theory, particularly in footnote references. The size of the book gives the editors no opportunity to give the benefit of their own consideration of the arguments involved in controversial issues. It would be a greater book, but a very different one, and a much larger one, if they did so.

R. H. Maudsley.

The English Conflict of Laws. By Clive M. Schmitthoff, ll.d.(lond.), ll.d.(berl.), of Gray's Inn, Barrister-at-Law, Lecturer in Legal Studies, the City of London College. Third Edition. [London: Stevens & Sons. 1954. XI, iii and 514 pp. 45s.]

When the second edition of this book was reviewed by Professor Gower in this *Review*, Vol. 12, p. 521, it was said that that edition had enhanced the reputation of this excellent work which it had deservedly won by its first edition. The present review could well make the same assertion in respect of the third edition. Dr. Schmitthoff has been at pains to bring the work up to date and, as far as the reviewer was able to ascertain, has entirely succeeded in doing so. A considerable amount of further material has been added—including even a reprint of the first recommendations of the Lord Chancellor's

Committee on private international law—but the size of the book has not been noticeably increased. The apparent increase in the number of pages is due to the adoption of a different and far more suitable lay-out by the new publishers, not to a corresponding increase in the length of the work. As before, this is a work of medium size which combines under one cover the functions of a clear, concise and attractive introduction to this topic for the use of students with those of a reliable first-hand guide for the use of a busy practitioner. One can but admire the skill, learning and common sense of the author who has made such a combination possible.

To achieve his goal, the author has had of course to cut out a number of sentences or paragraphs which had been contained in the second edition. In the present reviewer's opinion some of these cuts are regrettable and the original might well be restored, even if the book in future editions should thereby gain a little in bulk. Just because it is a book for students, quotations from cases are of particular value. In a few cases, the author has shortened these quotations by confining them to sentences which actually stipulate a rule or argue in favour of a point, and by leaving out sentences of a merely descriptive pictorial character. Sometimes, however, sentences of that type are of considerable mnemotechnic value and therefore of value to those who wish to gain access to a field hitherto unknown by them.

If space has to be saved this can well be done by a reduction of the length of the Introduction. The present reviewer has never felt that Dr. Schmitthoff's attempt to reduce the law of conflict of laws to the two leading principles of "vested rights" and "territoriality" has any great merit. The law of conflict of laws—like any other branch of law—is the result of a number of considerations of every kind whose analysis in the individual case may well be a complex one and whose exhaustive enumeration is impossible. Justice is not always capable of being analysed. Professor Graveson who—in the present reviewer's opinion rightly—maintains the view that the supreme purpose of the law of conflict of laws is to establish justice, should—contrary to Dr. Schmitthoff's claim—not on this account be classified as an adherent of the vested rights theory. There are many cases where it is a requirement of justice that a vested right should not be capable of being exercised and where this bar to a vested right does not result from the mere formal assertion of territorial sovereignty but from considerations of a legal-ethical character.

These, however, are ultimately considerations which belong to the field of jurisprudence rather than to that of the law of conflict of laws. A textbook of private international law has as little concern with them as has a textbook on the law of contract with the concept of personality or the principle of freedom to contract. Dr. Schmitthoff has written an excellent textbook on his field, and such disagreement as the present reviewer has with the basic idea of its introduction does not in any way detract from the praise which is due to the work.

E. J. Cohn.

Income Tax. Maintenance Relief and Agricultural Allowances. By F. E. Cutler Jones, B.A., Chartered Accountant. [London: Sweet & Maxwell Ltd. 1954. xvii and 320 pp. with Index 24 pp. 35s. net.]

For more than fifty years after the reimposition of the income tax in 1842 income from property was assessed (under Schedule A) on its gross annual value without any deduction for repairs. In 1894, probably as a sop to the large property owner burdened by the imposition of the new Estate Duty, a statutory deduction, varying according to the gross annual value assessed, was granted "for the purposes of collection" of the tax under Schedule A. In 1910, as compensation for the newly imposed supertax, relief was granted to

the owner of land and houses of small annual value upon the excess of the expenditure on "the maintenance, repair, insurance and management" of his property—based on the average of the five preceding years—over the statutory allowance referred to above; in the next few decades this allowance was extended to all property without any limit of annual value. In 1945 special additional allowances were given for the replacement of farmhouses, etc., and for capital expenditure made upon "agricultural and forestry land." These reliefs are clearly of great importance to all owners of property especially in view of the recent Housing Repairs and Rents Act, 1954, which entitles the lessor of property within the Rent Restriction Acts to increase his rent if he can prove that he has expended a certain minimum of repairs within the prescribed period. Yet in most textbooks on income tax these reliefs have received but cursory treatment so that the time was clearly ripe for a full-length work dealing with them. This need has been very adequately met by Mr. Cutler Jones in this essentially practical work, in the preparation of which he has clearly drawn upon his considerable experience as a practising accountant.

The book is divided into two main parts, the first of which deals with "maintenance claims" arising under section 101 of the Income Tax Act, 1952, and the second with the allowances for agricultural and forestry land to which sections 313–315 of the Act apply. The more important matters dealt with in Part I are the meaning of the term "repairs," the mode of preparing the claim, let properties with especial reference to excess rent liability and void relief, the early years of ownership and so on; it terminates with a most useful chapter (11)—"Practical Points"—which surveys the various practical matters that can arise on the submission of the form of claim (No. 99). Part II opens with an excellent account of the meaning of the term "husbandry" which is used to define "agricultural land" and then goes on to deal with the allowances which can be claimed for capital expenditure on farmhouse buildings, etc. Part III in five short pages deals with maintenance claims in regard to Surtax and the Special Contribution, while Part IV is concerned with Appeals before the Commissioners and to the High Court; these two parts could well have been left out, for they are not inadequately dealt with in the ordinary text-books. The book closes with two Appendices which bring it up to date—a brief account of the new Investment Allowances introduced by Mr. Butler in his 1954 Budget, and of the provisions of the Housing Repairs and Rents Act, 1954, with a brief commentary thereon.

The work is essentially practical as is evidenced by the large number of arithmetical examples introduced by the author to illustrate his points; this probably accounts for the lack of any sustained narrative and the subdivision of the subject-matter into 228 paragraphs, many of them very short. The most valuable sections of the book are those where Mr. Cutler Jones quotes Revenue practice or concessions, since, as there is but little case law on these reliefs, they are mostly dealt with by administrative instructions, the interpretation of which is often left to the discretion of the particular Inspector of Taxes. Your reviewer, despite forty years experience of income tax, has learned not a little and can thoroughly recommend this work to all concerned with the ownership of land, both the practitioner and the individual owner who prepares his own claim for relief.

A. FARNSWORTH.

CONTRACT AND THE FREEDOM OF THE DEBTOR IN THE COMMON LAW. By I. S. PAWATE. [Bombay: N. M. Tripathi Ltd. 1953. xiii and 145 pp. 12s. 6d.]

MR. Pawate has written another original and interesting book. In *Res Nullius* (1938) he put forward a provocative theory of ownership. Now he places

under careful scrutiny some accepted notions of the law of contract, particularly the doctrine of consideration. His basic premise is that in simple contracts, as in the case of promises under seal, the duty of the promisor is created by his own unaided will, by his intention to be bound. Were it not so, the promisor could not be regarded as perfectly free. To hold that acceptance and consideration infuse the binding force into the promise is tantamount to saying that the promisor is in effect bound by some external element and is to that extent unfree. There is no logical reason, the author maintains, why the declared will of one party should not generate a duty: not, indeed, in the sense of a relation between two persons but in the sense of an obligation binding the promisor to a particular course of conduct. It follows that the function of acceptance and consideration is limited to the giving of a right of action to the promisee. Any promise deliberately made is binding but the promisee cannot enforce it until he accepts it and furnishes the consideration.

These are certainly startling views but considered in the abstract not devoid of some attraction. Mr. Pawate writes well and forcibly and is able to supply a plausible solution to many tiresome problems of the law of contract. As handled by him *Gibbons* v. *Proctor,* the binding force of mutual promises and premature revocation of offers made in return for an act seem to lose most of their terrors. Nevertheless, it soon becomes evident that his theory cannot be accepted. There are far too many loose straws. To say that all promises are binding though unenforceable and to explain this on the ground that all promisors intend to be true to their word appears unrealistic and unhelpful. All the author's elaborate structure is, in the last analysis, built upon the shifting sands of morality and the law of nature. If an offer is binding by its own inherent force, how is it that the promisor can revoke it before acceptance? If an offer has been revoked but the offeree has accepted it before the revocation was known to him, how is it that the promisor remains bound? The author is not prepared to allow the promisor the liberty to change his mind, yet he fails to answer these questions with any degree of conviction. Above all, however, one wonders why the prevalent view that before acceptance there is no agreement and the offeror is not bound should of necessity be inconsistent with the freedom of the debtor. Are the rules as to acceptance and consideration at all relevant to the freedom issue? Admittedly, according to the current doctrine, the promisor is technically bound by something originating outside his own will. As, however, he chose to make the offer it is difficult to see why he should be regarded as unfree as long as the acceptance does not in any way affect the content of his duty.

The uneasiness which this reviewer feels is mainly caused by the fact that the author is not propounding a new theory of contractual obligation. On the contrary, he claims that his views do in fact represent the common law. This claim the author patently fails to substantiate. Such evidence as he manages to produce is meagre, unconvincing, and on occasion taken from elementary textbooks. Mr. Pawate himself observes that if he were asked to indicate only two cases on which his whole theory relies he would point to *Greenleaf* v. *Barker* (1590) and *Jordan's Case* (1528). Both these old cases are scantily reported and open to free interpretation by any imaginative person. Even an imaginative person, however, may be at a loss to see why *Boulton* v. *Jones* illustrates the proposition that the promisor is bound by virtue of his will alone or how in *Raffles* v. *Wichelhaus* on account of the mistake two valid contracts had in effect been made. Sometimes his argument itself is at fault. Thus the author takes Sir Frederick Pollock's definition of consideration as the price of the promise in a strictly literal sense and employs it for his own purposes in these words (p. 48): "In a sale, the price paid never adds anything to the qualities of the thing bought. The price given by the buyer does not make the horse bought either sound or unsound. Similarly, if consideration

is the price given for the promise, consideration does not add any quality to the promise bought; it does not make it either binding or not binding." The irrelevance and *non-sequitur* are obvious.

As might be expected, Mr. Pawate frequently resorts to the concepts of morality and the law of nature to support his thesis. On p. 96 he quotes Skynner C.B. as saying: "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements," and then himself adds: "And the law of England cannot go against the law of nature and say that a promise is not binding on the promisor by its inherent validity and force." It is at least questionable whether this is the right interpretation of the law of nature but, even if it is accepted, there is no doubt that the law of England can and does go against it.

J. K. Grodecki.

Geschichte der deutschen Rechtspflege seit 1500. By Erich Döhring. [Berlin: Duncker & Humblot. 1953. vi and 483 pp. DM 36.]

There are many books on the history of German law. There are very few books on the history of the administration of justice in Germany. There was—up to the appearance of Dr. Döhring's work—no comprehensive textbook on the modern history of the courts and the legal profession in Germany. To write a work of that kind, is indeed a formidable task. Unlike England, Germany was split up until very recently into numerous States of varying sizes, whose development just in this field differed even more widely than it did in the field of substantive law. A history of the administration of justice in Germany cannot consist in a straightforward tale of a single course of events. It is a story of tendencies and currents, of counter-tendencies and cross-currents. A work, which breaks this virgin ground, would have every excuse for numerous imperfections. A writer, such as Judge Dr. Döhring, who confesses in his preface that his book is the product of his spare time, and who lives in a small country-town, where the extraordinarily multifarious original sources are of course not at hand, would have every claim to a reviewer's indulgence. But this monumental work requires neither excuse nor indulgence. It is a master-piece in every respect; it can easily lay claim to rank among the most important and also the most attractive legal works, published in Germany during the last three or four decades.

The author writes as an historically minded lawyer and for lawyers with historical interests. This explains the fact, startling and perhaps objectionable to a "pure" historian, that he does not trace the story or stories of the administration of justice in Germany since 1500 in the form of a continuous historical treatment, giving a picture of the entirety of his field during the successive stages of development. Instead of such treatment, which in so many cases has made historical works seem to be utterly irrelevant to legal practitioners, he traces the development of the solution of individual problems in his field. How did the social position of judges come to be as it is today? How were advocates admitted to practice from 1500 until today? How and why did Germany abandon the division of the legal profession into two sections? What were the different forms of oral hearings in court during the last 450 years? These are the types of questions which Dr. Döhring answers. What has been said will suffice to show that his work is of outstanding importance to anybody who is in any way interested in questions of the past, present and future administration of justice, whether in Germany or elsewhere.

The interest is kept alive by the author from cover to cover of his work. The present reviewer at least has to confess that, once he had started reading the book, he found it impossible, except under extreme pressure, to lay it

aside. The learned author masters the art of presenting his vast material—all collected from original sources in a manner which keeps his readers spellbound. It is difficult within the scope of a review to give an idea of the wealth of colour, with which he paints his picture, of the constant combination of an abundance of detailed research with a complete mastery of the basic trends of development, of the care given to the general historical background on the one hand, and to the traces on the other hand, which a varied and often unfortunate trend of events left on the legal life of Germany. It must, however, be pointed out that the learned author has not set narrow limits to his field of investigation: his history includes the history of parts of Switzerland and of Austria. But even beyond this, his glance often sweeps across the boundaries of Continental Europe. In particular, the history of the administration of justice in this country frequently attracts his attention. Wherever he directs his glance—and he directs it into many corners which hardly ever have found the proper attention of other Continental lawyers—he is correct on his facts and just (and sometimes very shrewd) in his appreciation of them. It may suffice to point to such details as, *e.g.*, his remarks on the autobiographical literature of English lawyers and the absence of similar works in Germany, and to his notes on forensic eloquence in the two countries, to give some indication of the nature of the questions of which he, sometimes for the first time in Continental legal literature, has taken due notice.

Numerous are the questions of detail on which the author has shed new light. Even points like the type of paintings that grace a court room, the seating arrangements for the parties, for the advocates, for the treasury counsel, the character and quality of the food which a travelling solicitor can ask his client to obtain for him, nothing is felt to be too insignificant to round off a picture which becomes more lifelike from page to page. Seekers after oddities in legal lore who turn to this work will be richly rewarded. Text and illustrations alike (the latter all reproductions individually explained by the author) provide him with numerous amusing items. It may suffice to mention the drawing of the Imperial Court building at Rottweil, which existed as a wish-dream only of judges and advocates, the description of the judges who owned inns and compelled the inhabitants of their district to celebrate their weddings and other festivities there under threat of harsh treatment in court (p. 83) or the fictitious lawsuit between the farmers and the grasshoppers (p. 293), to show to those interested in this field of human activities, what awaits them.

Of course, we do no longer dream the dream of the impartial historian who merely reports without appreciating or judging. Dr. Döhring is rarely satisfied with merely describing what happened. He does not hold back with his feelings of approval and disapproval. One notices with gratification that there is little in this work of the unjustified complacency and self-satisfaction which has in the past been a characteristic feature of German historical writings in the field of law. The learned author is not reluctant to criticise where criticism is in place. He does not join in the chorus of praise and self-praise on the former Reichsgericht, which can now be heard all too often in German legal literature. He does not fail to see the parallels between legal institutions during the Hitler régime and in the Satellite East. There is more than one remark in this book, which has never before been made with similar frankness in the scientific literature of Germany. One might perhaps have wished that the author would have gone even a little farther in this field. His history ends in effect in 1933. There can be few people better qualified than he is to write a sequel. The "special courts," the "People's Courts," the inactivity of the law in the face of mass murder—clearly, all this belongs to the history of the administration of justice in Germany. Its roots were developed in the period which the author has so well described.

This work would not have been a correct mirror of the scene which it describes, had it not devoted a special chapter to legal science, which has always played a far greater part in Germany than in this country. There exists an excellent history of German legal science (by Stinzing-Landsberg). Yet the author has managed to make an original contribution even to this field. About one fifth of his book traces the relationship between legal science and legal practice. While the author's predecessors were giving preference to the theoreticians—Erik Wolf's *Great Thinkers in the Law* deals nearly exclusively with them—Dr. Döhring's loving care is devoted to the influence of theory on practice and vice versa. This chapter is supplemented by something never attempted before: some 100 pages of short biographies of leading German lawyers, including practitioners, to which a list of their works and bibliographical notes are appended. Attention must be directed to the fact that this list of works does not comprise the works already referred to in the text of Dr. Döhring's work, a fact which explains why often the principal works are not listed here.

No doubt this review has taken up more space than should normally be granted in an English legal periodical to a work on foreign legal history, written in a foreign language. The reviewer can, by way of excuse, do no more than say that the extraordinary services which this work can render to lawyers, historians, comparatists and to those interested in the history and sociology of humanity in general have seemed to him to justify the length of his report on a work which constitutes in his view an outstanding achievement.

E. J. Cohn.

Les Systèmes de Droit Contemporains. VII & VIII: Le Droit Soviétique. By René David and John N. Hazard, with a preface by L. Julliot de la Morandière. [Paris: Librairie Générale de Droit et de Jurisprudence. 1954. 2 Vols. viii and 367 pp. and 409 pp.]

The Institute of Comparative Law of the University of Paris has sponsored four previous volumes in a series on contemporary systems of law, and has three more in the press. For the production of these two volumes on Soviet law the Institute has joined forces with the International Committee for Comparative Law set up by UNESCO in 1949. The second volume, under the title: *Le droit et l'évolution de la Societé dans l'U.R.S.S.*, consists of a translation into French by Professor David, with minor amendments, of Professor Hazard's *Law and Social Change in the U.S.S.R.* The English edition of this work has already been reviewed at length in this journal. (Vol. 17, p. 281.)

Professor David's first volume, entitled *Les données fondamentales du droit Soviétique,* is an important and valuable work. Based on lectures delivered at the University of Paris, it is an exposition by a distinguished civil lawyer addressed primarily to civil lawyers, but the common lawyer should not be deterred, for the broad view is backed by a body of accurate practical information about Soviet law, presented with clarity and vigour. The four main parts into which the book is divided cover respectively the Russian legal tradition, law and Marxist doctrine, the sources of Soviet law, and the organisation of justice and the legal profession in the U.S.S.R. The Soviet constitution appears in an appendix.

The first part, consisting of an historical survey of Russian law from the tenth century laws of Kiev until 1917, worthily sustains Professor David's international reputation. Landmarks vividly illuminated are the Byzantine influence, lay and secular, which both distinguished Russia at an early date from the Roman-dominated West, and yet ensured an underlying similarity

between her law and the Western European systems; the Mongol inheritance of autocracy and separation from Western contacts; the old-established bureaucracy, corruption and secret police; the growing archaism of the law and its inaccessibility until 1832. Some disasters, such as the eighteenth century imposition of virtual slavery on peasants formerly free, receive lesser attention. Professor David insists that the pre-revolutionary tradition is the inescapable parent of the post-revolutionary approach to law. At p. 76 he says: "the answers given by Russian law were abandoned, but the framework within which they were pronounced remained, in large measure, the same. Soviet jurists, in expounding the rules of their law, use broadly speaking the categories, legal concepts and terminology of the old Russian law." Less happy is the explanation at p. 122 that family law is not included under the heading of civil law, as in France, because before 1917 it was religious and not secular law. The concept of the pre-revolutionary Russian empire as one unified more by morals and religion than by politics and law (p. 65) may be approached with some reserve, but the Russian soul fortunately makes only a fleeting appearance, at p. 70, as "in large measure the product of geographical conditions."

Considerable insight is shown in the treatment of Marxist doctrine and law. Professor David has, for example, a more realistic approach to the Soviet law of contract than some writers. His comment at pp. 187–8 that the fundamental Western distinction between movables and immovables is an inheritance of feudalism which has largely lost its justification under capitalism, and is replaced in the U.S.S.R. by the distinction between consumption goods and production goods, merits consideration, but if accepted one can foresee some nice problems concerning, for example, the tractor-driver's boots. The analogy at p. 85 between Soviet law and canon law is a useful refinement on the concept of communism as a religion. The section dealing with the sources of Soviet law involves a description of the economic foundations of the Soviet State, which is skilfully presented, though the placing of the constitution, "the fundamental law . . . enjoying unparalleled prestige," at the summit of the hierarchy of sources, and above the five-year plans, is at least open to question.

The review of the organisation of justice and the legal profession includes valuable descriptions of those little-known phenomena, the Prokuratura and the organs of public arbitration for the settlement of disputes between State enterprises. Unfortunately this section contains also two passages that not only fail to enlighten, but may seriously mislead. True, in his foreword Professor David announces his intention of expounding the theory of Soviet law much as this is done in the U.S.S.R., and for the most part remitting to Professor Hazard's volume the contrasts between law and practice, but his generally independent approach is poor preparation for a few lines at the end of a short passage on "special repressive tribunals." The jurisdiction of military tribunals, we are told, may be founded on the special position of those who infringe the law (members of the armed forces), or on the nature of the infringement (espionage, terrorism, treason, etc.). This is an inadequate description of the secret terror and death that lie at the core of Soviet society. There is also an unqualified panegyric at pp. 275–6 on the election of judges. Those of the superior courts, we read, are elected by the appropriate soviets: "that is to say, by the elected representatives of the Soviet people and not by the Government or the administration," while the link between the judges of the people's courts and the Soviet people "is even closer, or in any case, more direct, as since the Constitution of 1936, they are no longer nominated by the local soviets, but are elected on a suffrage universal, direct, equal and secret, by the citizens of the district." No reference here to party domination or the lists prepared of suitable persons amongst whom alone the electorate may exercise these universal, direct, equal and secret rights. Nor is the general effect greatly mitigated by the subsequent comment that this is the way to

avoid the danger which has become apparent, notably in the United States of America, of "government by judges, and of decisions given by judges which run contrary to the policy followed by the government, desired by Congress, and approved by the people in the elections." Alas poor Montesquieu!

O. M. Stone.

Epieikeia. By Edward Hake. Edited by D. E. C. Yale, Research Fellow of Christ's College, Cambridge; of the Inner Temple, Barrister-at-Law. With a Preface by Samuel E. Thorne. Yale University Press. [London: Geoffrey Cumberlege. 24s. net.]

Hake wrote these "Three Parts" on Equity sometime at the end of the sixteenth century. The first two parts deal with "Equity in General" and "the Equity of the Common Laws of England." Here his main theme is that the common law has its own equity, comparable to the equity of the Praetor, as instanced by its recognition of "circumstances," such as infancy, lunacy, inevitable necessity and the like; that the judge must apply this equity as part of his legal function; that he must derive it from the basic principles of the law rather than from his own conscience; and that if all else fails to achieve justice, application must be made to the "Prince" for an amendment of the law. The third part, of the Equity of the Chancery, is very short and singularly disappointing. He seems to accept the current concept that the Chancellor's equity is derived from the Chancellor's own conscience, but passes hurriedly on without squarely facing the difference in source or the political problems implicit therein. He seeks to justify the Chancery jurisdiction in equity by distinguishing between circumstances arising out of the case, such as infancy, and circumstances merely "collateral and from the case" which can only be dealt with in conscience by acting *per obliquum,* or *ad personam,* and not *ad rem.* For the rest, he is content to refer to the works of Crompton and West.

The whole is obviously and inevitably influenced by St. Germain's *Doctor and Student,* including the convenient dialogue form in which it is written. One gets from it some idea of the questions which were being canvassed in the reign of Elizabeth I, and something of the jealousy with which the common lawyers were again regarding a rapidly reviving jurisdiction. There are occasional sidelights on the history of legal history; the Statute *in Consimili Casu,* for instance, is referred to almost on the same page as actions on the case, but the two are not in any way associated with each other. But it is a very second-rate piece of work.

A. D. Hargreaves.

Essays on the Evolution of Religion with an Essay on Law and Morality. By K. J. Spalding, Fellow of Brasenose College, Oxford. [Oxford: George Ronald. 1954. 150 pp. 10s. 6d. net.]

The theme of Professor Spalding's book is simple and can best be epitomised in a passage from the "Theologica Germanica": "Of a truth, thoroughly to know oneself is above all art, for it is the highest art." Unfortunately his treatment of this theme is so abstruse as to be incomprehensible to anyone who has not had direct mystical experience. What for instance is one to make of the following typical passage: "The philosopher finds the thought he was

in want of by completing his thinking. Only, he reflects, in reason's assertion of the existence of God can reason maintain her claim that 'that alone can be which can be thought.' It can be for no imperfect thought of man to claim what reason's single perfect thought must claim; and that must therefore be too bold a thought which, being less than IT, would contend that its Object must needs respond to its claims with a flawless inexactitude." (p. 75)? Compared with this both St. Theresa and St. John of the Cross are easy reading, and Eckhart is lucidity itself. The layman who may be deflected permanently from any consideration of mysticism by such writing should turn to Evelyn Underhill's "Practical Mysticism" to see that the subject can be simply and intelligibly treated.

One had never thought of Brasenose undergraduates as mystics—muscular Christians perhaps—but the author assures us in his foreword that his book is the outcome of discussions with them, and he pays them full acknowledgment. Brasenose is full of surprises: one recalls with amazement that it was Walter Pater's college and that he discovered Beauty within its walls, but the thought of those extroverted young men reflecting on their "universal selves" in the midst of Torpids, or pondering on Professor Spalding's obscurities as they flash past the Isis barges in eights week, is too much for even the most credulous to accept.

Professor Spalding sees man's progress in religion as one from unconsciousness of self to a rational self-appreciation, and from thence transcending reason to a mystical union with God. What has all this to do with the law? Busy juniors in the Temple might be excused if they returned a sceptical answer and buried themselves with relief in the complications of their briefs. Professor Spalding does however trace a connection: the law by its harmonious wholeness is a true reflection of the Universal Mind, and by its observance the seeker is led to God. Like individuals within the national societies, States find the most effective means of transcending their own egoism by acceptance of rules of law, in their case rules of the international order. From this acceptance a new spiritual order will arise: "A Universal Community, bidden thus to look upwards, must grow hungry for every form of spiritual wisdom available to it. The nations constituting such a Society will freely open their national treasures to one another" (p. 148). This, like the rest of the book, is not so much an argument as a confession of faith. One respects the author's sincerity: one admires the wide reading which enables him to quote from Plotinus, St. Mark, Leonardo da Vinci, Pascal, Descartes and Francis Thompson within the space of a single chapter: but one remains convinced that law and mysticism do not mix. One is above reason, the other is essentially a rational science: Professor Spalding has yoked them unhappily together.

Norman St. John-Stevas.

The Teaching of the Social Sciences in the United Kingdom. [UNESCO. 1953. 140 pp. 6s.]

This volume on the teaching of the social sciences in the United Kingdom is one of a series of surveys designed to cover eight representative countries. An introduction on the general organisation of British Universities and other institutions for the promotion of higher learning by Sir Ernest Barker is followed by chapters on the teaching of (i) economics, (ii) political science, (iii) sociology, social anthropology and social psychology, (iv) international relations and (v) law. Each of these chapters begins with a general historical survey, and contains a more or less detailed account of the curricula and methods of teaching at the various Universities and University Colleges where these subjects are taught. The separation of legal education from the other social sciences is implied rather than stated. The chapter on

political science contains some provocative remarks about the teaching of constitutional and administrative law by lawyers, but no reference (cross or otherwise) is made to this in the chapter on legal education. We are not told, for instance, how far teachers untrained in law dabble with legal technique and cases under the guise of "political science," "public administration" or "government." The contribution on the University teaching of international relations is pessimistic, and perhaps lays insufficient stress on international law which must do much to fill the gap in some Universities.

The chapter on legal education, compiled from reports contributed by several members of the U.K. National Committee of Comparative Law and others whose names command respect, will naturally be of most interest to readers of this Review. It contains sections on legal education, both professional and academic, in England and Wales, Scotland and Northern Ireland; and these are followed by surveys on the teaching of jurisprudence in England and Wales and on comparative law studies in the United Kingdom. The difficulty inherent in the attempt to combine generalisation with selected detailed information, derived from a number of disparate sources, has on the whole been surmounted; the general view gives a fair picture, and the details are reasonably accurate. Incidentally, the Law Society's regulations for attendance at an approved law school and its examination syllabus have been altered since this book was compiled, and it is doubtful whether the Solicitor's Statutory Year course can still be said to give "a general education in legal subjects." We do not know in what sense the Law Society's school of law is said to be "the model" for the approved provincial law schools; but the statistics given for passes at the first attempt take no account of the fact that the provincial law schools have no control over the quality of the candidates, over the syllabus or over the examinations, nor do they for the most part prepare candidates for the solicitors' final examination.

The jurisprudence section strikes us as being admirably done, though we wonder whether Olivecrona has yet achieved such wide recognition in this country as is here suggested. We learn with interest that Cambridge is the only English (and British?) University where jurisprudence is at no stage a compulsory subject for a law degree. In the section on comparative legal studies, we think that greater notice might have been taken of the use of the comparative method in teaching such subjects as jurisprudence, Roman law, conflict of laws, and constitutional and administrative law. Indeed, outside jurisprudence and Roman law (Maine etc.), comparative public law has probably been taught longer in this country than comparative private law. We are thinking not only of Dicey and the *droit administratif* or Bryce and the American constitution, but for a generation now the study of the constitutional laws of the British Commonwealth has been a study in comparative law unawares. Commonwealth law reports were regularly used here for constitutional decisions before they were ransacked for cases on cattle trespass.

The Universities Reference Table in the Appendix was evidently compiled by a social scientist and not a lawyer. The summary of the facilities provided by the various University institutions includes a reference to their law degrees—sometimes first degrees only, but usually second degrees also —except that the English provincial or civic Universities are merely referred to (so far as law is concerned) as "approved law schools," an expression which relates to the training of articled clerks and has nothing to do with degree courses. If the Table is intended to be used for reference, this omission is misleading and should be corrected when another edition is published.

O. Hood Phillips.

The Indian Year Book of International Affairs, 1953, Vol. II. Published in India. [For sale by Stevens & Sons, London. 508 pp. 20s. net.]

This second volume of the Year Book, the first being published in 1953, continues the attempt to publicise and explain the Indian, and to a lesser extent the Asian, contribution to international law and relations. The contents are in three parts, dealing with International Economic Organisations and Economic Problems, International Relations (Past and Present), and International and Comparative Law. Some of the articles are mainly of historical interest but others, for example those on "India's Policy of Non-Alignment," "A Nehru Doctrine for Asia," and "The Sino-Tibetan Agreement of 1951," serve to focus attention on developments which are novel and too often overlooked. In Part Three there are articles on the recent constitutions of Burma, Indonesia, Ceylon and Pakistan of real interest to the constitutional lawyer or political theorist with a comparative approach. Of equal interest is the collection of recent Indian decisions in Public and Private International Law, and Constitutional Law, although the reviewer confesses to experiencing some difficulty in following the reasoning behind these decisions due to the practice, perhaps inevitable in view of the need to economise in space, of giving only fractions of the judgments with comments interjected by way of explanation. In particular it may be said that where a decision turns on the application of an article or provision of the Code the case note is of little value to foreign lawyers who are never given the benefit of having the article or provision cited in full.

Perhaps a more fundamental criticism is that of a lack of objectivity, for too often one feels that the identification of the views expressed in articles with the "official" Indian attitude is so close as to make the scholarship suspect; two examples will suffice. In the article on "India's Policy of Non-Alignment" the way in which India's neutrality in the Korean War is so blandly explained as consistent with "doing all she can to strengthen the Organisation" (UNO) is entirely unconvincing (p. 95.) Again in the article on the Kashmir Problem the bias is so obvious that its worth as an objective evaluation of a problem is nullified, and to compare the pleas of Sir Zahfrullah Khan with those of Hitler and Mussolini (p. 192) does little credit to a publication which, it is hoped, will take its place amongst those other Year Books which render so great a service to scholars everywhere.

D. W. Bowett.

Organising for Peace. International Organisation in World Affairs. By Daniel S. Cheever and H. Field Haviland, Jr. [London: Stevens & Sons Ltd. 1954. 917 pp. £2 15s. net.]

This is a most comprehensive survey of the development and function of international organisations in international affairs. The authors adopt an approach which is, basically, a parallel examination of the League and of the United Nations rather than an examination in series, and this certainly has the advantage of enabling the necessary contrasts and conclusions to be made without constantly referring the reader back to earlier chapters. There is, however, more to the book than this, and considerable emphasis is placed on regional arrangements in Part Four of the book, and elsewhere on the activities of what are now known as "specialised agencies," so that the "functionalist" approach is realistically stressed.

In the main the book is extremely detailed, and, moreover, accurate in its detail; it concludes each chapter with a useful bibliography and in all gives

the reader a wide and very readable account of the development of the various organisations in their legal, political, economic and social aspects. The authors make their points with vigour and forthrightness; for example they castigate the U.S.A. for her reservations on the Optional Clause, and her failure to ratify the Genocide Convention. That vexed problem of the relationship between the Secretariat and the U.S.A. where the Secretariat employs nationals of the host country suspected of subversive activities is very objectively and fairly treated. The "case-notes" in Chapter 15 of the various disputes and situations brought before the U.N. are of particular value, for they give the general perspective on problems which the specialist may wish to examine in any one particular aspect.

Occasionally, of course, the perspective is a little too general and one would wish for the account to be completed, or the reasons stated, or the answers attempted. For example, the authors advocate weighted voting in the General Assembly (p. 90) but nowhere indicate what they consider are the criteria by which the voting power of each State is to be assessed. Again, one reads that the Pact of Paris "has had significant influence. Its place in the law of nations was more recently strengthened by the Nuremberg trials and the U.N. Charter" (p. 130); the reader is probably entitled to rather more explanation of this statement than a footnote reference to Jessup's *Modern Law of Nations*. There are one or two omissions; at p. 406 the *Corfu* case of 1923 is dealt with without mention of the findings of the Commission of Jurists (of course the authors may take the view that since they were neither helpful nor meaningful their mention serves no useful purpose). At p. 140 the authors state that "under Art. 39 the Security Council alone determines the existence of any threat to the peace, breach of the peace, or act of aggression"; a cross-reference here to the Acheson Plan dealt with in Chapter 16 might complete the picture to the student's advantage. The word "adapted" on p. 150 must, I think, be a misprint for "adopted" in the context.

In conclusion one can only stress the comparative insignificance of these criticisms, for the authors have most certainly achieved their avowed objective of dispassionately examining the scope, function, and purpose of international organisations. Their treatment of European problems, of the Council of Europe, for example, is sympathetic to a degree, and the book should be of very real value to any student of international affairs.

D. W. Bowett.

Law and Disorders. By Sir Carleton Allen, Q.C. [London: Stevens and Sons, Ltd. 1954. 162 pp. 10s. 6d. net.]

Sir Carleton Allen has collected in this little volume a number of his more light-hearted legal essays, most of which have previously been published in the *Spectator* and other periodicals. The essays are, as Sir Carleton himself says, "trifles," but they have an underlying tone of seriousness, and in his final contribution he attempts to explain the reasons for the general unpopularity of lawyers. His remedy for this is a greater realisation on the lawyers' part that they are servants of the public and of justice. The author has long been a critic of the powers exercised by Government Departments, attacking them cogently in his book *Law and Orders*, and if the censure in this book is lighter it is, in its own way, as devastating. His arrows are not all aimed at the civil service, however, and many subjects from the sentimental attitude to the criminal to the anomalies of the common law rules relating to animals come under his penetrating and satiric gaze. Leslie Starke, who has enlivened a number of legal books

with his drawings, has provided some amusing illustrations to the text, and these are perhaps the best things in the book. For those lawyers who wish to relax for a few moments without straying too far from their subject this book can be warmly recommended.

Norman St. John-Stevas

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Encyclopaedia of Planning, Compulsory Purchase and Compensation. Vol. 1, Planning. Revision 19—May 31, 1954. Revision 20—September 30, 1954. Revision 21—January 1, 1955. Revision 22—February 1, 1955. Vol. 2, Compulsory Purchase and Compensation. Revision 19—May 31, 1954. Revision 20—September 30, 1954. Revision 21—January 1, 1955. Revision 23—June 30, 1955.

Williams' Law and Practice in Bankruptcy. Supplement to the Sixteenth Edition. By Muir Hunter, B.A. [London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1954. xix and 245 pp. 30s. net. With main work, £5 10s.]

Stroud's Judicial Dictionary of Words and Phrases. Third Edition. By John Burke and Peter Allsop. Vol. 4, S–Z. [London: Sweet & Maxwell, Ltd. 1953. xviii and 3363 pp. £3 15s. net.]

Die Handhabung der Strafgewalt gegen Angehörige des Deutschen Ritterordens. By Gerhard Schmidt. [Beihefte zum Jahrbuch der Albertus-Universität zu Königsberg / Pr. IV. Hölzner-Verlag Kitzingen-Main. 1954. vii and 179 pp.]

Lübisches Kaufmannsrecht, vornehmlich nach Lübecker Ratsurteilen des 15./16. Jahrhunderts. Von Wilhelm Ebel. [Der Göttinger Arbeitskreis. 112 pp.]

Report of United Nations Charter Review Committee of the International Law Association submitted to Edinburgh Conference, 1954.

A.B.C. Guide to the Practice of the Supreme Court. Supplement by D. Boland, M.B.E. 1954. 16 pp. [Sweet & Maxwell, Ltd. 1s. 6d. net.]

The Lawyer's Companion and Diary. No. 1: A Day to a Page. 25s. net. No. 2: A Week at an Opening. 21s. net. [Stevens & Sons, Ltd.]

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